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REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

By GEORGE W. HANSBROUGH.

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VIRGINIA
ALBANY

JUDGES
OF THE
SUPREME COURT OF APPEALS
DURING THE TIME OF THESE REPORTS.

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BENJAMIN W. LACY,
THOMAS T. FAUNTLEROY,
ROBERT A. RICHARDSON,
DRURY A. HINTON.

ATTORNEY-GENERAL:

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STATE REPORTER:

GEORGE W. HANSBROUGH.

* Term expired December 31st, 1885.

† Qualified January 1st, 1886.

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ERRATA.

Page 46, line 4 from bottom, for "statue" read "statute."

Page 92, line 7 from bottom, before "on" strike out "or."

Page 299, line 2 from bottom, after "even" read "if."

Page 685, line 5 from top, for "was" read "were."

Page 811, line 7 from bottom, for "debarred" read "barred."

Page 890, line 1 (index), for "bankruptcy" read "bastard."

CASES DECIDED
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

Richmond.

TUNSTALL, TRUSTEE, &C., V. CHRISTIAN, TRUSTEE, &C.

JANUARY 8th, 1885.

1. LAND—*Support—Source of right.*—The right to support for land in its natural condition, from subjacent and adjacent soil, is *ex jure nature*, not dependant on grant, and not acquirable by prescription.
2. BUILDINGS—*Support—Easement acquirable.*—The right to support for artificial burdens on land is an easement acquirable only by grant, express or implied; and neither this right nor the right to light and air can, in America, be acquired by prescription. *Secus* in England.
3. IDEM—*Idem—Implied.*—The right to support for artificial burdens on land may be implied from circumstances, *e. g.*: where houses needing each the other's support are built by same owner, and one is granted without stipulations to the contrary. But this implied right is confined to the *status quo* at time of grant, and extends not to increased burdens upon the soil.
4. IDEM—*Idem—Case at bar.*—L owned two lots, with light wooden buildings, adjoining each other. By purchase B acquired one By devise C acquired the other. The house on C's lot was burned. A similar one was built, and also burned, and was replaced by a three-story brick house, requiring a greatly-enlarged excavation. B afterwards removed his wooden house to rear an immense structure, requiring a deep excavation, and notified C to protect his property from injury by reason

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thereof. C obtained an injunction restraining B from excavating within *ten feet* of his foundation.

HELD:

1. C possesses no right, express or implied to support for his *building* from the soil of B.
2. B's failure to object to or his acquiescence in C's erecting his building, on his own land, does not *estop* B from denying C's right to support for that building from B's soil.
3. B is bound to use reasonable care and skill in making his excavation and erecting his structure, and is answerable for all damage done C by failing to use the same.
4. It would seem reasonable to require one about to endanger a neighbor's building by improving his own, to give that neighbor notice.

Appeal from decree of corporation court of Lynchburg, rendered August 1st, 1882, in a chancery suit wherein Camillus Christian, trustee for Mary D. Christian, and Mary P. Davis and als. were complainants, and A. A. Tunstall, trustee for Mary M. Brooks and als. were defendants.

In 1820 two adjoining lots in Lynchburg, on each whereof was a light, two-story wooden building, were owned by John Lynch. He conveyed one to his son-in-law, Alexander Liggatt, the father of Mrs. Brooks, one of the appellants. He devised the other to his daughter, Mrs. Zolinda Davis, under whom the appellees claim. The building on the latter lot was destroyed by fire; a similar one was erected in its place, and also destroyed. The appellees then, in 1877, erected a large, three-story brick store in its place, greatly enlarging the former excavations for that purpose. In 1882 the appellant removed the old building from Mrs. Brooks' lot to make way for a large and expensive building, and notified the appellee to protect his property from any injury which might result from the increased size and depth of the proposed excavation. The appellant began the work, and the appellee filed his bill in said corporation court, praying for an injunction to restrain him. The bill charged that the proposed building was of such size and character that the necessary excavations therefor would go below

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the foundation of his building, and would throw it down and destroy it, and claimed the right to support for his land and building from the adjacent and subjacent soil. An injunction was granted until further order. The defendant answered, denying the right to support, and that the proposed building was unnecessarily large, &c. Evidence was taken on both sides. At the hearing the corporation court perpetuated the injunction restraining the defendant from excavating within ten feet of the foundation of the plaintiff's building on a horizontal line at a right angle. From this decree an appeal was allowed the defendant, Tunstall.

Other facts are stated in the opinion.

Kean & Kean and *A. A. Tunstall*, for the appellants.

Christian & Christian, for the appellees.

LEWIS, P., delivered the opinion of the court.

The questions to be determined are—first, whether the appellees have acquired, by prescription, the right to lateral support for their building from the adjoining soil of the appellants; and if not, then second, whether such right has been acquired by implication.

1. It is well settled that the right to support for land from the adjacent and subjacent soil is a natural right, analogous to the flow of a natural river or of air. It stands on natural justice, and is not dependant upon grant; and for an invasion of the right an action is maintainable without proof of negligence. But the right is confined to the soil in its natural condition. It does not extend to buildings or other artificial burdens thereon, increasing the downward and lateral pressure. And therefore, if one by digging in his own soil occasions damage to the building of the adjoining owner, he is not liable therefor in an action by the latter, provided he has used due care and

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caution, and the plaintiff has not acquired the right to support in some mode recognized by law. 2 Rolle Abr. 564; *Stevenson v. Wallace*, 27 Gratt. 77; *Thurston v. Hancock*, 12 Mass. 220; *Gilmore v. Driscoll*, 122 Id. 199; *Transportation Co. v. Chicago*, 99 U. S. 635; *Penton v. Holland*, 17 Johns. 92; *Radcliff's ex'ors v. The Mayor, &c.*, 4 N. Y. 195; *Charless v. Rankin*, 22 Mo. 567.

The right to support for artificial burdens on land is an easement, and can be acquired only by grant, express or implied. According to the English decisions this right, which is treated as analogous to the right to light and air, may be acquired by prescription. In other words, a grant is presumed from lapse of time and accompanying facts. *Stansell v. Jollard*, 1 Selw. N. P. 445, *Humphries v. Brogden*, 12 Q. B. 749; *Dalton v. Angus*, 6 Appeal cases, L. R. 740.

But the English doctrine of "ancient lights" has been repudiated by the American courts as irreconcilable with principle, and not adapted to the rapid physical development of the country, especially in cities and towns. "And in this," says Washburn in his work on Easement, "is witnessed another illustration of the influence of those silent agencies which are constantly at work in a free community, in adapting and giving form and consistency to the rules of its common law, to meet the wants and conditions of the body politic." Ch. 4, sec. 6, p. 17; see also *Parker v. Foote*, 19 Wend. 308; *Pierre v. Fernall*, 26 Me. 436; *Haverstick v. Sipe*, 33 Penn. St. 368; *Napier v. Bulwinkle*, 5 Rich. (S. C.) 311; *Keats v. Hugo*, 115 Mass. 204; *Rogers v. Sarin*, 10 Gray, 376; *Smith v. White*, 11 Md. 23; *Powell v. Sims*, 5 W. Va. 1; *Hubbard v. Town*, 33 Vt. 295.

In a note to the case of *Stein v. Hauck*, 17 Am. Law Register (July, 1878), p. 440, a learned writer reviews the cases, and concludes as follows; "In view of the course of our decisions on this question, we think it may be reasonably concluded that, notwithstanding some early opinions to the contrary, it cannot now be safely asserted that the doctrine of a right to light and

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air by a mere prescriptive use prevails at present in a single American State."

The same reasoning would seem to apply with equal force to the English doctrine of a prescriptive right to support for buildings.

It is true that in some of the American cases are to be found *dicta* of the judges in favor of the doctrine. And in *Stevenson v. Wallace*, 27 Gratt., *supra*, there are expressions in the opinion of the court, founded on certain English cases, to the same effect. But the decision of the question was not necessarily involved, inasmuch as the right asserted in that case was held to be clearly implied from the terms of a deed by a common predecessor in title of the parties.

The doctrine may well enough apply to the acquisition of a right of way, or to the use of water and the like, but it is difficult to see how, on principle, it can be held to apply to a case like the present; for when a man builds on his own soil to its extremity he simply exercises a lawful right. He does not encroach upon the soil or invade the rights of his neighbor, and consequently there is nothing of which the latter can complain. Now, to acquire an easement by prescription, it is essential that the user be not only honest and uninterrupted for a number of years, but open and adverse, and it must be with the acquiescence of the owner of the servient tenement. 2 Min. Insts. 492, *et seq.* But how, under the circumstances mentioned, can there be said to be an *adverse* use of another's property? Or how can the acquiescence of one in an act be implied who has neither the right nor the power to prevent it? It is true that, in order to prevent the acquisition of the right, the adjoining owner might, by excavating in his own soil, bring down his neighbor's building before the right to support could be fully acquired. But such an extraordinary and unneighborly act would not only involve labor and expense, but might endanger and perhaps destroy his own house. And

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how can a man be reasonably required to injure his own property in order to preserve his rights respecting it?

The doctrine contended for by the appellees, whether heretofore maintained as resting on an absolute rule of law, or on the ordinary principles of prescription, is at variance with reason, and ought to be rejected. It may have been adapted to the age in which it was first announced in England, but is unsuited to the building of cities and towns in a progressive country like ours at the present day.

Fortunately, authority is not wanting in support of these views. The question arose and was carefully considered in a recent case by the supreme court of Georgia, in which it was held that the right to support for buildings can on no principle known to the law be acquired by prescription. *Mitchell v. Mayor of Rome, &c.*, 49 Ga. 19. The court said: "Neither in the case of the window opening out on another man's land, or of a building erected on the dividing line, has the owner committed an act against which his neighbor can protest. He has not touched his property, or invaded any right, or given any cause of action. He had a right to use or build on his lot to the furthest limit of his boundary. He has only done this, and never has had any use, or possession, or enjoyment of any right, corporeal or incorporeal, belonging to another, to which objection could in any form be made; and it would, therefore, be a misuse as well as an abuse of the terms *license, grant, and acquiescence* to say that he has acquired a right by means thereof from the owner of the adjoining lot. This was so expressly decided in *Hoy v. Sterrett*, 2 Watts, 227, and in *Richart v. Scott*, Id. 460. The grounds upon which these decisions are put are precisely the same as those in the cases applicable to light and air."

Similar views, though *obiter*, were expressed by Chief Justice Gray, in the later case of *Gilmore v. Driscoll*, 122 Mass., *supra*. See also note to the case of *Thurston v. Hancock*, 7 Am. Dec.

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62, *et seq.*; Bennett's Goddard on Easement, 231, *et seq.*; Wood on Nuisances, chap. 5, sec. 202.

We are therefore of opinion that, as a prescriptive right, the claim of the appellees cannot be sustained.

2. The next question is whether it can be sustained on the theory of an implied grant.

The right to support is implied where houses are built in common by the same owner, each needing the support of the other, and a grant of one is made without express stipulation to the contrary. In such case the owner is presumed, as against himself, to grant the right to support, and so reciprocally to reserve the right in his own favor. The right is also implied where property, consisting of a house and unimproved land, is severed by sale. And the right to support, thus granted and reserved, is transmitted to the successors in title of the parties respectively. *Richards v. Ross*, 9 Exch. 218; *Stevenson v. Wallace*, 27 Gratt. 88; Bennett's Goddard, 227.

But the right is confined to the condition of things at the time of the grant. If, therefore, increased burdens are afterwards placed upon the soil, as by erecting new buildings or adding to those already erected, and damage to the building is caused by excavations in the adjoining soil, an action is not maintainable for the injury if it would not have occurred except for the increased weight. Bennett's Goddard, 414. See generally on the subject of easements by implication, *Sanderlin v. Barter*, 76 Va. 299, and cases cited.

The application of this principle is decisive of the present case. It appears that the titles of the parties were derived from a common grantor, John Lynch, who, in 1820, sold the lot now owned by the appellants, reserving the lot now owned by the appellees. The last-mentioned lot was soon afterwards, by his will, devised to his daughter. At the time the property was severed by sale, each lot was occupied by a light, two-story wooden building, the one adjoining the other. That on the lot of the appellees having been destroyed by fire, in 1863, was re-

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placed by a similar structure, which also was afterwards burned. Soon thereafter the appellees' present building was erected, which is a three-story brick building, and of vastly greater weight and proportions than the original wooden structure. Moreover, in erecting the present building, the original excavation was greatly enlarged, being extended back to the extremity of the lot. It appears that originally the cellar extended back from the front line, on Main street, only a distance of some sixty or seventy feet, or less than one-half the length of the present foundation. It further appears that so much of the destroyed buildings as did not rest on the stone walls at the sides of the cellar was supported by blocks, and that for a distance of one-half or more of the length of the present building there was, before it was erected, no building (or at least none that can be definitely located), and that consequently, as to that distance, there could have been no implied easement of support from the appellees' soil. The evidence satisfactorily shows that, in view of the nature of the soil, the proposed excavation can be made, with the exercise of reasonable skill, without danger of serious injury to the appellees' building. And it shows, beyond reasonable doubt, that but for the increased burden upon the soil, by the erection of that building, the work could be accomplished without at all endangering the adjoining property. This is substantially testified to by the appellees' own witness, Forstberg, a civil engineer, and to the same effect is the testimony of other witnesses.

It is contended, however, that the appellants are estopped from denying the claim asserted, on the ground of their implied acquiescence in the erection of the appellees' building as it is. But this contention is not well founded. The answer is similar to what has already been said in respect to the claim of a right by prescription, namely—that in erecting their building the appellees merely exercised a lawful right, not in derogation of the appellants' rights, and were in no way influenced or induced to do so by the latter. There is no ground, therefore,

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upon which the doctrine of estoppel can be applied to a case like the present.

But although the implied right to support has thus been lost, yet the appellants are bound to use reasonable care and skill in the prosecution of their work; and what is such care and skill is a question always to be determined on the particular facts and circumstances of the case. *Foley v. Wyeth*, 2 Allen (Mass.), 131; *Shafer v. Wilson*, 44 Md. 268; *City of Quincy v. Jones*, 76 Ill. 342; *McMillan v. Staples*, 36 Iowa, 532; *Charless v. Rankin*, 22 Mo. 566.

There is nothing in the record to show that thus far the appellants have not proceeded with reasonable care and a due regard for the rights of the appellees. It appears that before commencing their excavation, they formally notified the latter, in writing, of their plans and intentions, and invited them to take such steps as they might see fit to protect their interests. Whether it was incumbent on them to give such notice is a question not necessary to be determined; but the obligation to do so would seem to be a reasonable requirement. In the case of *Lasala v. Holbrook*, 4 Paige, 169, Chancellor Walworth said: "From the recent English decisions it appears that the party who is about to endanger the building of his neighbor, by a reasonable improvement on his own land, is bound to give the owner of the adjacent lot proper notice of the intended improvement, and to use ordinary skill in conducting the same; and that it is the duty of the latter to shore or prop up his own building, so as to render it secure in the mean time." And it was accordingly held in that case that, as the defendant was proceeding with reasonable care and caution in the erection of his building, and in laying the foundations thereof, which he proposed to sink to a depth of ten feet below the foundation of the complainant's building, it was for the latter to adopt measures to secure their building against the dangers to which it was exposed.

In *Massey v. Goyder*, 4 C. & P. 161 (19 Eng. Com. Law, 321),
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it was held that the defendant, having given notice to the occupant of the adjoining lot of his intended improvement, was only bound to use reasonable and ordinary care in the work, and was not bound in any other way to secure the adjoining building from injury; although from the peculiar nature of the soil, he was compelled to lay the foundation of his new building several feet deeper than that of the old.

These principles have been recognized in numerous cases, and may be considered as well established. Nevertheless, by the decree complained of, the appellants, the defendants below, were not only restrained from carrying out their designs, but, in the language of the decree, were enjoined from "continuing their excavation to within ten feet of the foundation of the plaintiff's building, on a horizontal line at right angles, that being, in the opinion of the court, a sufficient lateral and subjacent supporting soil to prevent any damage to the plaintiffs' lot or property." We are unable to see upon what ground this decree can be sustained. In our opinion, it is unwarranted both by the law and the facts of the case.

The proposed building of the appellants, it is true, is, in point of size, unusual for the city of Lynchburg; but considering its central and desirable location, and the increasing population and business of the city, it cannot be said to be larger than the probable demand for such buildings in the near future will require. Nor can it be inferred that when the lot of the appellants was sold by John Lynch, in 1820, it was the intention of the parties that the wooden structure then standing should never be replaced by a more convenient and commodious building—better adapted for business purposes. Such an inference would be most unreasonable, and cannot be seriously contended for.

The decree must be reversed, and the bill dismissed.

DECREE REVERSED.

Richmond.

GILL v. BARBOUR.

JANUARY 8th, 1885:

1. JUDICIAL SALES—*Purchase-money paid into court and lost.*—Where purchaser at judicial sale buys in all the liens save one, and is allowed credit therefor, and then to prevent re-sale, pays into bank, with approval of the court, the amount of the said lien, which the court recognizes as appropriated to the owners of the said lien, and which is later lost by the bank's failure, the loss will fall wholly on the owners of the said lien. Had there remained more than one unsatisfied lien, the loss would then have fallen on the general fund, and been borne by the lienors in the inverse order of the priority of their liens.

Appeal of N. R. Gill and J. T. H. Bringman, trustees for J. G. Hewes and J. G. Miller, from three decrees of circuit court of Fauquier county, entered December 23d, 1876, April 15th, 1879, and December 15th, 1881, respectively, in five chancery causes heard together; four in the short style of *Barbour v. Barbour*, and one in the short style of *Miller v. Miller*.

Opinion states the case.

J. G. & W. W. Field, J. Y. Menefee, and G. D. Gray, for the appellants.

John F. Rixey, W. W. Henry, and J. C. Gibson, for the appellees.

LACY, J., delivered the opinion of the court.

In the suits of *Barbour v. Barbour* a tract of land called "Fleetwood," situated in the county of Culpeper, was ordered

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to be sold; and on the 21st of August, 1855, the said tract of land was sold to Henry Miller, at the price of \$30,000, by special commissioners of the court. This sale was reported to court and confirmed.

In 1862 Henry Miller died intestate, leaving \$3,055.07 of the purchase-money for this land still unpaid.

In April, 1866, J. G. and H. B. Miller & Co. and other creditors of Henry Miller instituted a chancery suit in the circuit court of Culpeper to subject the real estate of Henry Miller to the payment of his debts, the personal estate proving insufficient; and Barbour and Thompson, the special commissioners of the circuit court of Fauquier, who had made the sale of "Fleetwood" to Henry Miller, were made parties defendants. The bill was a general creditors' bill, and set forth that the whole of the purchase-money for "Fleetwood" had been paid.

In June, 1866, a decree was entered in this suit for accounts, it not appearing to the court that Henry Miller had fully paid the purchase-money for "Fleetwood."

In November, 1866, the Barbour suits were removed from the circuit court of Fauquier to the circuit court of Culpeper, and there docketed, and ordered to be heard with the suit of Miller v. Miller.

In the same month a decree was entered for the sale of "Fleetwood," to pay the debts of Henry Miller, and commissioners appointed to make the sale, an account ordered of the balance due to the commissioners of the court in the Barbour suits, Barbour and Thompson, and the purpose of the court declared to pay to them the balance due them out of the proceeds of the sale of "Fleetwood."

Menefee and Gibson were appointed commissioners of the court to make the sale, and on the 16th of September, 1867, they sold "Fleetwood" to J. G. Miller, at the sum of \$26,590.50, which sale was reported to and confirmed by the court on the 9th of November, 1867. J. G. Miller was the largest creditor of Henry Miller, holding a trust-deed lien of \$13,000 on

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"Fleetwood." He became the owner of the other debts against Henry Miller by purchase, and the same were assigned to him, except the lien due on the original purchase by Henry Miller in the Barbour suits. This amount is called in the subsequent proceedings the Barbour lien.

In April, 1874, a decree was entered in the causes, confirming the report of the commissioner as to the amount of the Barbour and other liens, and commissioners Menefee and Gibson directed to collect the balance of the purchase-money due upon the purchase of "Fleetwood," allowing J. G. Miller to retain so much of the said purchase-money as he was entitled to by purchase. And they were directed to deposit the money so collected in the Bank of Culpeper. On May 1st, 1874, the same commissioners were directed not to deposit this money when collected in the said bank, but to pay it to the court commissioners in the Barbour suits, Barbour and Thompson, upon the execution by the said Barbour and Thompson of a bond, in the penalty of \$10,000, properly conditioned, it being a matter in controversy whether this money belonged to the devisees of Mrs. Barbour's father, James Byrne, or to the creditors of Mrs. Barbour; and a reference was had to a commissioner to ascertain and report upon that question.

After a rule against J. G. Miller to show cause against it, at the February term, 1875, a decree was entered upon the return of the rule, directing J. G. Miller to pay this money to the commissioners of the court, Menefee and Gibson, within sixty days, in default of which the said commissioners were directed to sell "Fleetwood" again, and the decree directing the payment to commissioners Barbour and Thompson was set aside as to that direction.

In the meantime J. G. Miller had sold "Fleetwood" to J. G. Hewes, and at the request of said Hewes conveyed the same to the appellants, Gill and Bringman. And at the April term, 1875, the said trustees filed their petition in the cause, setting forth the fact that they had become the purchasers of "Fleet-

wood"; had assumed the payment of the Barbour lien still subsisting thereon; that they were prepared to pay the same, amounting on that day to \$5,450.18, and had deposited that sum in the Bank of Culpeper, taking a certificate for the same; praying the court to receive, and disburse as was right the same, and set aside the decree of the February term directing a resale to pay the said lien, and that they be relieved of the lien of the said Barbour debt. The Bank of Culpeper was in the town of Culpeper, in which the court was then being held.

On the 6th of April the court, by decree in the cause, gave the petitioners leave to file their petition and the said certificate of deposit, and set aside the decree which had been entered in the cause at the February term preceding, to sell the said land to satisfy the said Barbour lien; and on the next day, by its order, drew out of the said bank \$500 of the said sum of money so deposited to pay to the said commissioners, Menefee and Gibson, their commissions then unpaid on the said sale.

On the 5th of July following the causes were, by decree entered therein, removed to the circuit court of Fauquier for further proceedings to be had therein.

On the 24th of December, 1875, the circuit court of Fauquier entered a decree directing one of the said commissioners of the court, Gibson, to withdraw from the papers in the causes the certificate of the Bank of Culpeper, and to collect the same.

The Bank of Culpeper was unable to pay the said sum, and it was lost.

Where does the loss fall—on those entitled to the Barbour lien, or on the purchasers of the land—the appellants? The circuit court of Fauquier, by its decree of December 23d, 1876, held that the sum of \$5,450.18, paid in cash in the Bank of Culpeper, was received by the circuit court of Culpeper as a payment on account of the purchase-money of the realty called "Fleetwood" due by J. G. Miller, the purchaser thereof, and was a credit to these causes in said bank, and that the said sum not having been appropriated by decree made subsequently

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to said 5th day of April, 1875, to any claim to any party to these causes (save and except a portion thereof paid to the commissioners of sale for their commissions), if the same be lost by the insolvency of said bank, such loss is to be borne by the general fund in the causes, and not to fall upon the devisees of James Byrne, deceased; and that the Barbour lien is still due and unpaid, and is the first lien upon the land called "Fleetwood." By the decree of April, 1879, the court received and dismissed the petition of the appellants for a rehearing, and by the decree of December, 1881, decreed a sale of "Fleetwood," to satisfy the Barbour lien, that appearing to be the only lien unsatisfied.

From these decrees the appellants applied for and obtained an appeal to this court, which was awarded July 14th, 1882.

The sole question in this cause in dispute in this court is whether the loss of this fund in the Bank of Culpeper, deposited in the bank under the foregoing circumstances, should fall on the purchaser or on the creditor.

It cannot be maintained, as is strenuously insisted by the appellees, that this is a contest between the lienors; that as to the purchaser, he has been credited with the money he has paid in the Bank of Culpeper to the order of and with the approval of the court, and that thus there is no controversy with him as purchaser of the land in regard to that sum.

That argument omits the important element in the question—that he has not only paid this part of the purchase-money, but that he has paid the entire purchase-money, in the manner approved by the court. The commissioners were directed to allow him credit for the debts he had become the owner of, and to collect of him the balance of the purchase-money, accurately described and determined by a master's report in the cause; and a rule was awarded against him to show cause why the land should not be resold to pay this particular sum of money, and a decree was entered directing him to pay this sum, the balance of the purchase-money, within sixty days. This sum was

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not only the purchase-money, but all the purchase-money with which the court could charge him or decree against him. He came into court, and paid the purchase-money into court, and the court took charge of it, and held it, for reasons which were doubtless deemed judicious, and dispensed a part of it, and proceeded to collect the residue, when the bank failed. The money was in the hands of the court in effect, and this is conceded by the argument, for it is not held that the loss should fall on the purchaser as if no payment was made at all, but it is held that the purchaser as such is discharged of so much, and the payment is thus admitted, and its receipt by the court conceded, and the loss is held to fall on the lien-holders in the inverse order of their priorities.

But in this case there was no other and is no other lien on this land nor on the purchase-money than this one, which was satisfied by payment in full. If the bank had not failed, there is and could be no other claimant for this fund than the holders of the Barbour lien; the other liens have been paid by the purchaser, and extinguished. It is true that the payment of a junior lien would be without prejudice and without effect on a senior lien; the superior lien was so before the payment of any junior lien, and so remained after the payment of the junior lien obviously; and it is not in point to argue that the senior lien cannot be prejudiced by the payment of the junior lien. It is admitted by the appellants that the payment of the junior liens had no effect whatever on the first lien.

But it is admitted that the first lien remained subsisting in full force and effect after the junior lien had been paid off and discharged—the purchaser having found it to his interest to pay the other liens, did not deny the obligation of the first lien, but admitted it. And when the court, recognizing the payment of all the other liens, decreed a sale of the land to satisfy this first lien, the purchaser came forward to prevent the sale of his land, and paid that to the court's receiver. It was a payment of the money into court, and a discharge of the balance of the

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purchase-money—it was then the first as it was the only lien upon the land, and upon its payment the order for the resale was set aside. If it was only a payment on account of liens, as is now held by the circuit court, and was not a payment in full of all liens, why was the order of sale set aside? The first lien having been paid, why not proceed to sell for the other unpaid liens, if any? This lien having been paid, the next lien became the first, and so on in their order all the liens came up for recognition.

Obviously the Barbour lien was then the only lien claimed against the land, the others having been paid and satisfied—that was the purchase-money; and when the purchase-money was duly paid into court or to the receiver of the court the purchaser was entitled to be discharged from it, and to receive a deed for the land, he having paid the purchase-money in full. And the decree of the circuit court being in effect to require this purchaser to insure the money in the hands of the court, into which he has been compelled by its process to pay it, is erroneous, and should be reversed and annulled.

The special commissioners of the court were, however, entitled to their commissions of \$551, with interest thereon from November 9th, 1867, out of the fund before distribution. The effect of the decree of April 5th, 1875, was to withdraw this sum from the debt due under the first lien. It cannot be placed there; but if the fund is insufficient to pay all the debts, it must fall upon the fund belonging to the creditors of the lowest class; and as the appellants have assumed the obligation of these debts, this sum of \$551, with interest, must be paid by them to the appellees, who are entitled to the Barbour debt, who have paid this sum to the said commissioners, and this cause should be remanded to the circuit court of Fauquier county for decree to that end.

DECREE REVERSED.

Richmond.

JONES v. THE COMMONWEALTH.

JANUARY 8th, 1885.

1. CRIMINAL PROCEEDINGS—*Lascivious Cohabitation*.—To sustain an indictment under section 7, chapter 7, Criminal Procedure of 1878, page 302, the evidence must establish that the parties, not being married, lewdly and lasciviously associated and cohabited—that is, lived together in the same house as man and wife live together.
2. IDEM—*Idem*—*Cases compared*.—*Scott v. The Commonwealth*, 77 Va. 344, distinguished from the case at bar.

Error to judgment of corporation court of Danville, rendered June 9th, 1884, sentencing D'Orsay Jones to pay a fine of fifty dollars and costs on an indictment against him for lewd and lascivious cohabitation with one Kate Oliver, without being married to her.

Opinion states the case.

A. M. Aiken, for the plaintiff in error.

Attorney-General F. S. Blair, for the Commonwealth.

FAUNTLEROY, J., delivered the opinion of the court.

The plaintiff in error was tried and convicted in the corporation court of Danville upon an indictment for unlawful, lewd and lascivious association and cohabitation with one Kate Oliver, being unmarried to each other at and during the time.

The verdict of the jury imposed a fine of \$50, and the court gave judgment for the said fine and the costs against the ac-

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cused; and to that judgment this writ of error was awarded by this court.

The errors assigned in the petition are the refusal of the court to give an instruction which was asked for by the defendant, as set forth in "Bill of Exception No. 1," and the action of the court in giving to the jury, on their application, the oral instruction embraced in "Exception No. 2," and in refusing and overruling the motion to set aside the verdict and grant a new trial, upon the ground that the verdict was contrary to the law and the evidence, which constitutes the third bill of exception, setting forth a certificate of facts.

In the view which we take of the facts certified to have been proved in this case, it is necessary to pass in review only the third and last bill of exception, as that goes fully both as to the law and the evidence in the case.

The indictment in this case is framed and founded on the seventh section of chapter 7, New Criminal Procedure, page 302, Acts 1877-'78, which is in these words: "If any persons, not married to each other, lewdly and lasciviously associate and cohabit together, or, whether married or not, be guilty of open and gross lewdness and lasciviousness, they shall be fined not less than \$50 nor more than \$500," &c.

This section of the statute is not designed to punish for the offences of *fornication* or *adultery*. Those are the subject of section 6, chapter 7, of New Criminal Procedure, page 302, Acts 1877-'78.

The offence charged in the indictment is to "lewdly and lasciviously associate and cohabit together"—"not married to each other." It is a statutory offence, and the statute must be strictly conformed to. *Commonwealth v. Isaacs and West*, 5 Rand. 635.

The terms "not married to each other" and "lewdly and lasciviously associate and cohabit together" clearly explain the meaning of the statute as intended to apply to cases where a man and a woman, "not married to each other," live together

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as man and wife live together, without the sanction of the nuptial tie. There must be "*cohabitation*," and there must be *lewd and lascivious* cohabitation. There must be a living together.

"*Cohabit*" is defined by Webster: 1. "To dwell with another in the same place." 2. "To live together as husband and wife." *Bouvier* defines "*cohabit*": "To live together in the same house, claiming to be married;" "to live together in the same house." Obviously the legal sense of the term in the statute is to live together in the same house as married persons live together, or in the manner of husband and wife.

There may be illicit intercourse and even lewd and lascivious intercourse between man and woman, which would be *fornication* or *adultery*, as the case might be, and which are punishable by the law as offences against sound morals and good government; but these offences are not charged in the indictment in this case, and cannot be punished under the seventh section of the statute, which forbids persons, not married to each other, lewdly and lasciviously to associate *and* cohabit together. The conjunction "*and*," in the phrase of the section, is essentially and indispensably *copulative*; there must be both—lewd and lascivious intercourse, *and* a living together of the parties as husband and wife live together—to constitute the offence of lewd and lascivious association and cohabitation.

In *Scott v. The Commonwealth*, 77 Va., the parties, being unmarried, were proved to have lived together, and to have lived together as man and wife, and to have acknowledged a common progeny and relation as though married. *Vide Commonwealth v. Isaacs and West*, 5 Rand. 635, *supra*; *Searls v. The People*, 15 Ill. 597; *State v. Marrin*, 12 Iowa, 499; *Wright v. The State*, 5 Blackford, 358; *Commonwealth v. Calef*, 10 Mass. 153; *Scott v. Commonwealth*, 77 Va. 346, *supra*; *Carotti v. The State*, 42 Miss. 334.

As to the evidence certified by the judge in the *certificate of facts*, there is not the slightest particle of testimony to prove or even tending to prove that the plaintiff in error, Jones, lewdly

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and lasciviously associated and cohabited with the woman Kate Oliver. The facts certified prove that he did *not cohabit* with her. They show that he never dwelt or lived with her; and they fail to show that he had ever been guilty of lewdness or lasciviousness with or towards her. The only mere implication that he might possibly have had some intimacy with her is the statement of the witness, Belle Holland, that Kate Oliver said to her, in the presence of the plaintiff in error, that she, Kate Oliver, had been "his friend," and he had been "*visiting her*." Thus implicating nothing but, at the most and the worst, mere private incontinence; and proving that he did not *cohabit* with her, as, assuredly, to visit a harlot or a bawdy house does not constitute the lewd and lascivious *cohabitation* inhibited and punished by the section of the statute under which this indictment was found and prosecuted, however wicked and despicable such prostitution is justly held to be by all refined and virtuous people.

We are of opinion that the verdict of the jury in this case is against the law and the evidence, and that the corporation court of Danville erred in overruling the motion to set it aside and grant a new trial. The verdict must therefore be set aside, and the judgment of the court rendered thereon be reversed and annulled, and the cause remanded for a new trial.

JUDGMENT REVERSED.

Richmond.

WISSLER v. CRAIG'S ADM'R.

JANUARY 8th, 1885.

1. LACHES is neglect to do something one ought to do. Mere lapse of time, unaccompanied by circumstances affording evidence of a presumption that the right has been abandoned, is not considered "laches." *Cole v. Ballard*, 78 Va. 139.
2. IDEM—*Indicia of laches*—Where, from delay, no correct account can be taken, and any conclusion the court may arrive at must at best be conjectural, and the original transactions have become so obscured by lapse of time, loss of evidence, and death of parties, as to render it difficult to do justice, the case will be considered as a case of "laches," and the court will not relieve the plaintiff. *Harrison v. Gibson*, 23 Gratt. 212.
3. IDEM—*Case at bar* is one which, tested by the recognized criteria, is not a case of such laches as should prevent a court of equity from affording relief to the plaintiff. But it is one in which the maxim, *caveat emptor*, is clearly applicable to the defendant as a purchaser at a judicial sale of land included in an unreleased, duly-recorded trust-deed.

Appeal from a decree of the circuit court of Shenandoah county, rendered April 14th, 1884, in the chancery cause of Walton Craig, administrator d. b. n. c. t. a. of Peter Craig, deceased, complainant, against Jonathan Foltz's administrator and others, defendants. Argued at Staunton, but decided at Richmond.

By deed, duly recorded in 1856, said Foltz conveyed to R. M. Conn, trustee, 573 acres of land in said county, to secure to Peter Craig a debt of \$2,938. In 1859 Conn, the trustee, sold 362 acres thereof, and applied the proceeds to the debt, leaving unpaid about \$2,317 as of July 24th, 1863, when Foltz paid that

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sum, in Confederate currency, to Philip Helsley, who, Peter Craig being then dead, had been appointed curator pending a contest about his will. But the curator did not cause the trustee to execute a release of the trust-deed. In 1867 Foltz sued the curator and the trustee in chancery for the release. In 1871 the circuit court held the payment valid, but did not direct the execution of a release. The will having been established, Helsley had qualified as Peter Craig's executor; but having been removed, in 1872, Walton Craig qualified as administrator *de bonis non* with the will annexed of said Peter Craig, and in 1878 instituted a suit against Helsley for a *derastavit* in receiving, as such curator, said currency. To the bill Helsley demurred, and appealed to this court from the decree overruling his demurrer, which decree was affirmed (see *Helsley and als. v. Craig's adm'r and als.*, 33 Gratt. 716), and Helsley required to answer the bill. The suit rested. In 1880 Helsley and the trustee, Conn, petitioned for a rehearing of the interlocutory decree of 1871, but it was refused. From the decree of refusal they appealed to this court, which reversed the decree, and held that the receipt of the Confederate currency was a *derastavit* and that Foltz was entitled to neither a release nor a credit therefor. See *Helsley and als. v. Foltz*, 76 Va. 671.

In August, 1863 after paying the Confederate currency to the curator on the balance of the trust-debt, Foltz sold and conveyed eighty-four acres of the said 572 acres to one Philip Heltzell, who was cognizant of the trust-deed and of the payment in said currency. After Heltzell's decease, under a decree in a suit by his creditors against his heirs, those eighty-four acres were sold; the sale was confirmed, and the deed was made to the appellant, Jacob Wissler, who had paid the purchase-money. The bill for the sale and the conveyance of the land to Wissler both described it as "the land Heltzell had purchased of Foltz." Other parcels of the trust-land had been sold and conveyed by Foltz in his lifetime to different persons.

In 1883 Walton Craig, as such administrator, instituted this suit to obtain the aid of said circuit court in ascertaining what amount was still due to his testator's estate, and in enforcing said trust-deed. Wissler answered the bill, setting up his purchase, the improvements he had made, his claim to be allowed therefor, and that Craig's representative had been guilty of such laches in collecting the said debt as debarred him from subjecting the land held by the respondent. But the circuit court disallowed the claim for improvement. held there had been no laches, and decreed that Craig's administrator recover of Foltz's administrator, out of funds in his hands to be administered, \$4,726.50, with interest on \$1,988.89 from October 12th, 1883, till paid and costs; and in default of payment in thirty days, that the balance of the 572 acres be sold in the inverse order of the several alienations of the different parcels thereof. From that decree an appeal and *supersedeas* was allowed Jacob Wissler.

Henry C. Allen, for the appellant.

John E. Roller, for the appellee.

RICHARDSON, J., delivered the opinion of the court.

The case is this: By deed, dated 21st of March, 1856, and duly recorded, Jonathan Foltz conveyed to R. M. Conn, trustee, a tract of 573 acres of land in Shenandoah county, in trust to secure Peter Craig the payment of \$2,938.

In 1859 the trustee sold 362 acres of said tract, and applied the proceeds to the trust-debt, leaving a balance unpaid. Craig, the beneficiary in said deed, died in 1862. A contest arose about Craig's will, during which Philip Helsley, curator of Craig's estate, on the 24th of July, 1863, received of Foltz \$2,317, the supposed balance of the trust-debt, which sum was received in Confederate States treasury notes. Then there arose a controversy as to the conditions on which the Confed-

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erate notes had been received, and Conn, the trustee, refused to execute a release of the trust-deed. So, in 1867, Foltz instituted a chancery suit in the circuit court of Shenandoah county against Conn, trustee, and said Helsley, who had become the executor of Peter Craig, deceased, to compel the execution of such release. That suit was heard in September, 1871, when the circuit court held the payment to be valid, and ordered an account of the residue, if any, remaining unpaid on the trust-debt; but *did not* order the release of the trust-deed. Nothing further was done in this suit or under the trust-deed for several years. In 1872 Helsley ceased to be executor, and Walton Craig qualified as administrator d. b. n. with the will annexed of Peter Craig, deceased, and in 1878 instituted a chancery suit in said circuit court against Helsley, curator, &c., charging him with a *devastavit* in receiving the Confederate money in discharge of the trust-debt. Helsley demurred to the bill, the circuit court overruled the demurrer, and Helsley appealed to this court, which, in 1880, affirmed the decree, and remanded the cause for further proceedings. See *Helsley v. Craig's administrator*, 33 Gratt. 716. During the year 1880 Helsley and Conn petitioned the circuit court to rehear and reverse the decree of September, 1871, in the cause of Foltz v. Helsley, curator, and Conn, trustee, but the court refused to rehear. From this decree of refusal they obtained, in May, 1880, an appeal to this court, which reversed said decree of September, 1871, and adjudged that the receipt of the Confederate money, in discharge of the trust-debt, was a *devastavit* by said curator, in which the trust-debtor participated; and that the latter was entitled neither to a release of the trust-deed nor to a credit for the amount so paid. See *Helsley v. Foltz*, 76 Va. 671.

After paying the Confederate money to the curator, Foltz, in August, 1863, conveyed eighty-three acres of the land embraced in the trust-deed to Philip Heltzell, who was cognizant of the trust-deed, of the payment in Confederate money, of

the controversy about the conditions of the payment, and of the trustee's refusal to make the release, for the record shows he was examined as a witness to the payment in the suit of Foltz *v.* Helsley and Conn.

Philip Heltzell having died, a chancery suit was brought in 1876 in said court by Samuel Myers and other creditors of Heltzell, against his administrators and heirs, to subject the said eighty-three acres of land to the payment of his debts; and the same having been sold, under a decree in that cause, Jacob Wissler, the appellant here, became the purchaser, and the sale was confirmed to him, the purchase-money paid, and the land conveyed to the purchaser. In this suit the bill and the deed to Wissler both described the land as that Heltzell purchased of Foltz. By deed, dated February 1st, 1864, Foltz conveyed sixty acres of the land embraced in said trust-deed to B. P. Newman, who, in 1879, conveyed it to B. F. Coffman, by whom it was conveyed to the said Wissler, who, in turn, conveyed it to Charles L. Pierson. And by deed of February 6th, 1873, Foltz conveyed nine and a half acres of said trust-land to B. F. Coffinan, who, in May, 1881, conveyed it to the said Jacob Wissler. So that the latter thus become the purchaser of three parcels of the land embraced in the trust-deed, the sale of which was directed by the decree of 14th April, 1884, entered by the circuit court in the case of Walton Craig, adm'r, &c., against Jonathan Foltz's adm'r and heirs, Philip Heltzell's adm'r and heirs, B. P. Newman, B. F. Coffinan, Jacob Wissler, and R. M. Conn, trustee.

In his bill the complainant set out a full history of the facts aforesaid; recited that in December, 1882, after the reversal of the decree of September, 1871, the circuit court, in the case of Craig's adm'r, &c., against Helsley, curator, and Conn, declared that it would not be proper to decide that suit until the Foltz lands had been sold, and it had been ascertained whether or not there would be a loss of any part of the debt due Craig's estate from Foltz; and he averred that in performing the duty

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of collecting the balance due on that debt he found so many difficulties in the way that he felt compelled to invoke the aid of a court of equity; and he prayed for a reference, to ascertain the balance due, and to settle the trustee's accounts, and for general relief.

The cause having been regularly matured, a decree was entered referring it to a master, to inquire and state (1) what balance is due on the debt of Jonathan Foltz to Peter Craig, secured in the deed of trust of March 21st, 1856, to R. M. Conn, trustee; (2) a settlement of the accounts of said trustee; (3) what part of the land embraced in the trust-deed was sold by the trustee, and what part has not been sold; (4) whether any of the lands unsold by the trustee were aliened by Jonathan Foltz, or by those claiming under him, to whom aliened, and in what order said lands should be subjected to sale to pay any balances due on any trust-deed. In obedience to this decree the master reported that the funds received by the trustee for the 362 acres of the land sold by him had been by him properly disbursed, but that the balance due on said debt was \$4,726.50, principal and interest, as of October 12th, 1883; that the residue of the land, after deducting the 362 acres, had been aliened by Foltz in five parcels, three of which had been purchased (as before stated) by Jacob Wissler. The latter filed his separate demurrer and answer to the bill. He admitted the facts as stated in the bill, but insisted that Walton Craig, administrator of Peter Craig, deceased, rested on the decree of September, 1871, and instituted a chancery suit to charge said curator with a *derastavit* in receiving of Foltz Confederate money in discharge of the trust-debt; that so far as said administrator is concerned, said decree would have remained unreversed, and that it was too late then for him to come and ask the aid of a court of equity to subject the portion of the real estate, embraced in the deed of trust, which had been aliened to innocent purchasers for full value; and that the complainant had been guilty of such *laches* as to debar him from any relief so far as

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he (Wissler) was concerned and his interests were involved in the premises. Said respondent, Wissler, then proceeded to state how far, and how he became interested in, and what improvements he had put upon said parcels of land since he acquired them, and insisted that he was entitled, at least, to compensation for the improvements, and asked for an account thereof.

At the hearing the circuit court held* that the defendant, Wissler, was not entitled to allowance for his improvements, as against the creditor secured by the deed of trust; confirmed the report; adjudged that there had been no *laches* on the part of the complainant, Walton Craig, adm'r, &c., and decreed that he recover of Joseph Stickle, administrator of Jonathan Foltz, deceased, the sum of \$4,726.50, with interest on \$1,988.89, part thereof, from October 12th, 1883, until paid, and his costs, to be paid *de bonis decedentis*, in his hands to be administered; and that said debt is a valid lien under the deed of trust in the bill mentioned, upon the lands conveyed therein and not sold by the trustee, and that the lands unsold by the trustee are liable to sale to satisfy this decree, in the inverse order of alienation; and that unless the debt and costs be paid within thirty days, then special commissioners John E. Roller and Henry C. Allen shall sell the lands, &c.

From that decree the case is here on appeal obtained by Wissler, and now to be disposed of.

Upon full examination of the whole case, as presented by the record, we are of opinion that there is no error in the decree of the circuit court, and that it must be affirmed.

The only assignment of error set forth in the petition is the same substantially as that set up, by way of defence, in the answer of Wissler in the court below

"The personal representative of Peter Craig, deceased, acquiesced in the decree of 1871, in the cause of Jonathan Foltz v. Philip Helsley, curator, &c., and als., until adverse rights accrued in perfect good faith, and still continued to acquiesce in

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the assertion of these rights by the petitioner and his alienees for years, and that therefore relief should have been refused when Peter Craig's administrator came into court to assert a right which he had negligently lost."

The counsel for the appellant refers to and relies upon *Hatcher v. Hall*, 77 Va. 573, where Lewis, P., says: "It is an inherent doctrine of courts of equity to refuse relief where there has been gross *laches* in prosecuting rights and unreasonable acquiescence in the assertion of adverse rights."

That the principle above quoted is correctly laid down there can be no doubt; and if the facts and circumstances disclosed by the record could bring this case within the influence of that principle, then the plain duty of this court would be to reverse and annul the decree complained of. And the same result would follow if this case came within the well-settled doctrine that, though the period during which a party neglects to assert his rights does not constitute a statutory bar to the claim asserted, yet the attending circumstances may justify the dismissal of the plaintiff's bill. *Foster's curator v. Rison*, 17 Gratt. 335; *Harrison v. Gibson*, 23 Gratt. 212; and *Golden v. Kimmell*, 99 U. S. R. 201.

But clearly this case does not come within these principles when tested by the record. The appropriate inquiry here is: Has the complainant below, the appellee here, the administrator of Peter Craig, deceased, been guilty of such *laches*, in collecting the debt due his decedent's estate from Foltz, and secured by the deed of trust on Foltz's lands now in the possession of the appellant, Wissler, and his alienees, as ought to bar the right to enforce that trust-deed as against them?

In *Harrison v. Gibson*, *supra*, it was held that where, from delay, no correct account could be taken, and any conclusion to which the court arrived must, at best, be conjectural, and the original transactions have become so obscured by lapse of time, loss of evidence, and death of parties, as to render it difficult to do justice, the court will not relieve the plaintiff.

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Looking to these *criteria*, do they or any of them apply to the case in hand, and bring it within the rule to dismiss the plaintiff's bill? *Laches* is such neglect or omission to do what one should do as warrants the presumption that he has abandoned his claim, and declines to assert his right.

How stands the case here? The record nowhere shows that the representatives of Peter Craig ever gave reasonable ground to justify any one to suppose even that the right to collect the Foltz debt, by enforcing the trust-deed on his land, had been abandoned. On the contrary every act, fairly construed, indicated quite the contrary. The trust-deed was duly recorded. The amount of the trust-debt was ascertained. The facts connected with the alleged discharge of the balance, by the payment of Confederate money, were preserved in the record of the suit of Foltz v. Helsley, curator, &c., and the fact that the payment was no discharge had become *res-judicata* before this suit was instituted, in 1883. Nothing had, by lapse of time or *laches*, become obscure. There was no room for conjecture. The pathway to a full and fair settlement, upon fixed legal principles, was open and plain, with no obstruction to the attainment of complete justice.

When Philip Heltzell purchased the eighty-three acres he was cognizant of all the circumstances. He could have had no color of claim to a better right than the trust-deed gave. The decree in the creditor's suit against his representative and heirs directed a sale of his land which he purchased of Foltz. Wissler purchased at the judicial sale, accepted conveyance of the same land, and bought and received title to only what had been Heltzell's. The familiar maxim *careat emptor*, so often quoted as applicable to purchasers at such sales, applies with peculiar appropriateness to this purchaser.

So soon as Helsley, the curator, discovered that the conditions upon which he consented to receive the Confederate money from Foltz had not been fulfilled, he refused to allow Conn, the trustee, to release the trust-deed. In 1867 Foltz instituted his

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suit to compel the execution of the release. In 1871 the circuit court decided that the payment in Confederate money was a valid credit on the trust-debt, but ordered the true balance to be ascertained, and did not order the release to be executed.

Walton Craig, adm'r, &c., was no party to that suit, and had no authority to have it reheard or appealed. Helsley ceased to be executor in 1872, but took no step to have the decree of 1871 reheard or appealed, as no release had been decreed. In 1878 Walton Craig, adm'r, &c., sued Helsley, curator, &c., for the *derastavit*. Helsley attempted defence by demurrer, but failed in that, and then it was he conceived the idea of avoiding his liability by appealing from the decree of 1871, which was in the way of the enforcement of the deed of trust. That impediment being removed by the reversal, three months afterwards—to-wit, in the month of December, 1882—the circuit court refused to decide the question of *derastavit* until the Foltz lands had been sold under the trust-deed of 1856. And in June following the appellee instituted his suit to remove the difficulties which the trust-debtor, Foltz, and his alienees, including the appellant, had placed in the way of the enforcement of said deed of trust. This history of these various transactions seems to evince not abandonment, but long and pertinacious efforts to hold on to the lien of the trust-deed on all the land embraced therein, as a security for and means of payment of the debt thereby secured, on the part of the representatives of Peter Craig.

It is true that the appellant paid his money for the parcels of land, and doubtless thought himself safe in so doing; but in this he disregarded the knowledge or means of knowledge at his command amply sufficient for his protection. There was the recorded trust-deed, unreleased. That clew, diligently followed up, could but have afforded all needed information as to the exact condition of the title he was paying his money for. It would have led him to knowledge of Foltz's suit for the release; to the decree of 1871, which did not order the release,

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and which was interlocutory, and amenable at any time to be reheard and reversed. And surely so long as that decree was liable to reversal, on appeal or upon rehearing, it was reckless in Wissler to rely on it as a finality.

“Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat emptor* is one of the best-settled maxims of the law, and applies exclusively to a purchaser. He must make due inquiry, or he may not be a *bona-fide* purchaser. He is bound not only by *actual* but also by constructive notice, which is the same in effect as actual notice.” *Burwell's adm'rs v. Fauber*, 21 Gratt. 446. And in *Cardozer v. Hood*, 17 Wall. 1, it is said: “Means of knowledge, with the duty of using them, are, in equity, equivalent to knowledge itself.”

In the light of these principles it is clear that the loss and hardship of which the appellant complains is attributable solely to his own careless neglect of the ample opportunities of information at his command, and not to any *laches* of the appellee, and that the decree of April 14th, 1884, must be affirmed, with costs to the latter.

DECREE AFFIRMED.

Richmond.

MILLER v. THE COMMONWEALTH.

JANUARY 8th, 1885.

1. CONSTRUCTION OF STATUTES—*Exemption from jury duty.*—Where, under section 16 of the act approved March 17th, 1884, to provide for the government of Virginia volunteers, Acts 1883-'84, page 615, a roll of a volunteer military company is filed with the clerk of the court, the members thereof are exempt from summons for jury duty, and, if summoned, need not attend to make their excuses.

Error to judgment of corporation court of Danville, rendered June 12th, 1884, sentencing one E. H. Miller to pay to the Commonwealth the sum of \$20 for an alleged contempt of said court in failing to obey a summons executed upon him to appear and serve on a jury. In answer to a rule to show cause why such fine should not be imposed on him, he appeared and answered that he was a contributing member of a volunteer military company, the "Danville Grays," and had complied with the statute in such case provided, and was exempt from service as a juror.

A. M. Aiken, for the plaintiff in error.

Attorney-General F. S. Blair, for the Commonwealth.

LACY, J., delivered the opinion of the court.

The plaintiff in error, E. H. Miller, was summoned to serve as a juror in the corporation court of Danville on the 2d day of

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June, 1884. The said Miller, failing to attend in obedience to the said summons, was summoned, by order of the court, to appear at once to show cause why he should not be fined for contempt.

He thereupon appeared in court, in response to the summons, and being duly sworn, answered that, being a contributing member of a volunteer military company of the city, known as the Danville Grays, organized under the laws of Virginia, he did not consider himself liable to be summoned and to be compelled to serve as a juror, and therefore did not attend the said court as a juror as aforesaid.

But the court, deeming this answer insufficient, and his refusal to attend as aforesaid contemptuous to the said court, fined him \$20. To this judgment of the corporation court of Danville, upon the petition of the said E. H. Miller, a writ of error was awarded to this court.

The record shows that the plaintiff in error was a contributing member of a volunteer military company, organized under the laws of Virginia, and that the chief officer of said company had duly filed, with the clerk of the said corporation court, the roll or list of the active and contributing members of said company, in conformity with section 16 of an act approved March 17th, 1884, to provide for the government of Virginia volunteers, and that the name of said E. H. Miller was upon said list.

The said sixteenth section of the act in question provides that: "Each active and contributing member of every legally-organized volunteer company shall be entitled to receive from the commanding officer thereof a certificate of membership, which certificate of membership shall exempt but not disqualify the person therein named from jury duty, for the period of one year from the date of his said certificate, in any and all the courts of the Commonwealth. But to entitle the members of such company to this exemption, the captain or chief officer of such company shall, annually, on the first of May in each

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year, furnish to the clerk of the hustings or county court of the county, city or town wherein such company may be, a list containing the name of each member of his company; and where there are contributing members to his company, the name of each contributing member shall be furnished likewise."

This law was complied with in all respects. The plaintiff in error was a contributing member of this military company, duly organized under the laws of Virginia; the chief officer of his company had duly filed the list of the company with the clerk of his court, and his name appeared thereon; he was exempt from the duty required of him, by the law, and he duly pleaded his exemption before the court in his answer to the rule awarded against him. And yet the presiding judge considered this answer insufficient. We are not furnished with any reasons for this judgment by the judge who rendered it, and imposed this fine.

But it is suggested in argument by the Attorney General, on behalf of the commonwealth, that when a person summoned to serve as a juror is exempt by law from such service, he is nevertheless obliged to attend and get himself excused from service by the court, or he will be in contempt; that the duty of the plaintiff in error when summoned to attend the court to serve as a juror, was to submit the question as to whether he was exempt from such service or not to the court, and not undertake to be the judge of the question himself. Under the 13th section of the act of 1871-'2, page 393, after which section sixteen, just considered, was modeled, and which was repealed by the act in question, which was approved March 17th, 1884, this exemption was provided for in similar language; but the provision of the law which requires the list to be left with the clerk by the chief officer of the company was not a part of the former law, and was doubtless enacted to provide for the very circumstance suggested by the argument just cited. It would often happen that although a citizen would have in his hands a certificate of membership, the officers of the county preparing

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a jury list would summon him to perform this public service from which he was by law exempt. And the citizen might be put to as much trouble and inconvenience to plead his exemption as if he performed the service. A citizen who has ridden a long distance in the country to attend a court to get excused from serving on a jury, or who has already left his business in a city to attend court for that purpose, could find but little relief in this tardy recognition of his legal rights. But what excuse is there for a clerk to summon or for a judge to compel a citizen to be summoned to the performance of any public service in the court from which he is exempt by law, when the fact that he is so exempt is in the hands of the very officer who issues against him this unlawful requisition, and placed there by the express mandate of the law. If the court can lawfully compel the citizen to attend upon the court to get excused from a service from which the law exempts him, the law may be practically annulled by the court. But it is as much the duty of the court to enforce the law as it is the privilege of the citizen to claim its exemption.

A person exempt by law from service on a jury, is in like manner exempt from being summoned to serve on a jury.

Upon the trial of the rule in this case, the answer of the defendant therein was a complete and lawful answer to the same, and he was entitled to have the rule against him discharged, and the judgment of the court declaring him guilty, and imposing a fine upon him was wholly erroneous and without lawful authority, and the said judgment must be reversed and annulled.

LEWIS, P., dissenting, said:

I dissent from the opinion in this case. I apprehend it was the duty of the plaintiff in error to have obeyed the summons to attend the court, and there to have claimed his exemption, if he chose to do so. The exemption of the statute is from jury-

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service, not from the obligation to respect the process of the courts. Any other construction is inconsistent with the due and orderly administration of justice, and the maintenance of proper respect for the judicial tribunals of the State. The plaintiff in error was, therefore, in contempt for his failure to appear, and become liable to punishment therefor, whether as a matter of fact he was exempt from jury service or not. And whether a party is exempt under the statute depends upon the existence of facts which may be controverted. Thus, it may be *denied* that the name of the party was properly placed on the list which is required to be filed with the clerk; or, if properly placed there, that he has continued to be a member of the company to which he claims to belong. And these are questions, when raised, to be determined by the court. I think the judgment should be affirmed.

The other judges concurred with LACY, J.

JUDGMENT REVERSED.

Richmond.

TOWN OF DANVILLE v. BLACKWELL, JUDGE.

JANUARY 8th, 1885.

1. REMOVAL OF CAUSES—*Constitution*.—Act of March 7th, 1884, Acts 1883-'84, page 424, directing that on motion, on twenty days' notice by any party, any suit or proceeding pending in a corporation court shall be removed, as of right, to the circuit court of said corporation, is not unconstitutional.
2. *IDEM*—*Mistrial*—*Waiver*—*Mandamus*.—In such a case there was ineffectual trial. At next term defendant, after notice under said act, moved for the removal of the case to the circuit court, and the corporation court denied the motion.

HELD:

1. Right of removal was not waived.
2. *Mandamus* is the remedy for refusal to remove.

Application of town of Danville, presented to this court November 5th, 1884, for a writ of *mandamus* to require the judge of the corporation court of said town to remove a suit therein pending against said town to the circuit court of said corporation for trial, notice for such removal having been made by said town under an act of the General Assembly, approved March 7th, 1884, and entitled "an act to amend section 1, chapter 170, Code 1873, in relation to the removal of causes from the corporation to the circuit courts," Acts 1883-'84, page 424, which motion had been overruled and the removal of the suit refused by said judge. The motion was made after there

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had been an ineffectual trial by a jury, which, being unable to agree on a verdict, had been discharged.

Opinion states the facts fully.

Peatross & Harris, for the petitioner.

Berkeley & Harrison, for the respondent.

FAUNTLEROY, J., delivered the opinion of the court.

The town of Danville, a municipal corporation chartered by the General Assembly of Virginia, filed its petition in this court, representing that in April, 1884, one Green Banister sued the said petitioner in the corporation court of Danville, in an action of trespass on the case, seeking therein to recover damages to the amount of \$1,000; that on July 28th, 1884, the petitioner, under the act of assembly of March 7th, 1884, in such cases made and provided, gave notice to the plaintiff below of a motion, to be made on the first day of the next September term of the said corporation court, to remove the said cause from the said corporation court to the circuit court of Danville; that after due legal notice to the plaintiff below the petitioner made its said motion on the day designated therefor, and the same was docketed, and continued from time to time, upon arguments of counsel; and the said corporation court, after taking time to consider thereof, did, upon Tuesday, the 9th day of September, 1884, make and enter an order overruling the said motion, and refusing to remove the said cause from the said corporation court to the said circuit court. Whereupon the petitioner prayed for a writ of *mandamus* to be awarded by this court to compel and require the Hon. John D. Blackwell, judge of the said corporation court of Danville, as said judge, to perform the duty made incumbent on him by the statute in this regard, and to remove the said cause from the said corporation court to the said circuit court.

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Upon consideration of said petition, a rule *nisi* was ordered by this court, dated at Staunton, on September 26th, 1884, requiring the said John D. Blackwell, judge of the corporation court of Danville, to show cause, on November 5th, 1884, before this court, why such peremptory writ of *mandamus* should not be issued, as prayed for in the said petition of the town of Danville.

In response to this aforesaid rule, the said John D. Blackwell demurred to the petition as being wholly insufficient in law, and made return thereto as follows—to-wit: “That Green Banister brought his action of trespass on the case to April rules, 1884, against the town of Danville, and the said action came up for trial at the July term, 1884, of his said court, when said town appeared, pleaded, and went to trial; but the jury failed to agree, and the cause was continued to the next quarterly term of the court, which was the October term, 1884, in due course. That the said petition and order recite, so far as they go, the subsequent motion and proceedings thereon for a removal of the case into the circuit court of the town of Danville, under the Act 1883-’84, chapter 320, page 424; but fails to show that the opposition to the motion by the plaintiff, Green Banister, was based upon these grounds—viz: First, The waiver of the defendant town of any right to avail itself of the benefit of the statute, by its appearance at the July term, 1884, and submission to trial; and second, the unconstitutionality of the statute as against public policy, and against the spirit if not in violation of the letter of the constitution; and it appearing that the sole reason for the motion of the defendant town was to hinder, delay, and obstruct the plaintiff in the pursuit of his lawful remedy, guaranteed to him by the express provision of the constitution; and no cause of removal of any kind being shown or pretended by the defendant town or its counsel, except its bare right under said statute, upon argument, the court denied defendant’s motion, and refused to remove said cause into the circuit court.”

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The facts set out in the petition and admitted by the demurrer, as well as in the answer or return of respondent to the rule, show that all the circumstances required by the act of March 7th, 1884 (Acts 1883-'84, page 424), exist to bring the petitioner, the defendant town of Danville in the court below, within the terms and intendment of the law, whose express language is: "Section 1. Any motion, suit, or other proceeding, pending in a corporation court, shall be removed, as of right, to the circuit court having jurisdiction of such corporation, on the motion of any party; but twenty days' notice of the motion for removal shall be given to the other party or parties, or his or their solicitors or attorneys. And on motion of any party to a suit, motion, or other proceeding, in a county or corporation court, who desires to remove the same to any other county, circuit, or corporation court than that having jurisdiction over said county or corporation, the court may, after twenty days' notice to the adverse party or his attorney, order such removal." The motion for removal of the cause in this case was made under the first clause of the above-recited section of the act of assembly. It is express, explicit, unambiguous, mandatory, and imperative—imposing upon the judge of a corporation court the mere ministerial, perfunctory duty to remove the cause, upon the mere motion, as of absolute right, without cause, of any party to the proceeding pending in the corporation court, upon the one single and sole condition of twenty days' notice of the motion to the other party or parties, or his or their solicitors or attorneys.

The right of the town, defendant, to have the cause removed was absolute under the statute when the applicant or mover was within the terms or conditions imposed by the statute; and the duty of the corporation court, when so applied to, to remove is equally absolute. It is not optional or discretionary with the court, in such case, whether it will remove the cause or not. Such absolute rights and duties of removal arise and are provided for in certain cases of removal from State to Federal

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courts; in cases of removal from justices to county and corporation courts (Code 1873, chapter 147, section 1); in cases of appeals provided for by Code 1873, chapter 178, section 1, and in Criminal Code, chapter 25, section 2, and others.

To compel the corporation court of Danville to perform this absolute duty, and to obtain for itself the benefit of this absolute right, the town of Danville has no open and adequate remedy but by *mandamus*. Appeal from the refusal of the court to order the removal would not lie at that stage of the cause; and appeal from the final determination of the cause in the corporation court, if it remain and be tried there, might be, in the language of this court in *Brown v. Crippen & Wise*, 4 H. & M. 173, "too late;" and even then such an appeal would not bring up or secure the review of the order the effects of which the *mandamus* is invoked as a remedy for. In *Brown v. Crippen & Wise*, *supra*, Judge Tucker, speaking for the court, said: "The removal of the cause in such a case is a matter of right which ought not to be refused to any defendant who makes out his case and complies with the terms of the law." "Being of opinion that the county court refused to perform a duty which was enjoined by law, a *mandamus at that stage of the cause* was the only remedy. The defendant could neither appeal nor obtain a writ of error or of *supersedeas* until the final decision of the suit, when it might be too late."

In the case of *Cowan v. Fulton*, *Judge*, 23 Gratt. 579, the circuit judge of Pulaski county made his return to a writ of *mandamus nisi*, stating, in substance, that he had stricken the case from his docket without hearing it on the merits, because he was of the opinion that he had no constitutional right to hear or try it—that the law requiring him so to do was unconstitutional. Judge Bouldin, delivering the opinion of the court in this case said: "We see no constitutional objection to the legislation. But it is insisted that, conceding the law referred to to be constitutional, still the judgment of the circuit court, dismissing the cause for want of jurisdiction and striking it from the

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docket, is a final judgment in the cause; and the term at which the supposed judgment was rendered having passed by, it is not competent to the appellate court, *by mandamus*, to compel in effect a rehearing of the cause. If the premises were true, the conclusion might perhaps be conceded; for it is certainly not regular nor proper to use the writ of *mandamus* to review or rehear the judgment of a subordinate court; but the fallacy of the argument consists in the *assumption that there was a judgment in the cause*, whereas the court positively and unequivocally refused to pass on it at all, either to 'review, reverse, or affirm the judgment,' and merely directed 'that the cause be dismissed and stricken from the docket.' It was a simple refusal to hear and decide the case; and this court having held that no appeal lies from such refusal, it is exactly the case to which the high remedial writ of *mandamus* is most frequently applied in order to prevent a defect or failure of justice."

"It issues at common law from the King's Bench to compel inferior tribunals faithfully to execute their legitimate powers 'whenever the same are denied or delayed.' Tapping on *Mandamus*, page 154 (marg. 105). In obedience to these principles of the common law it was held, in the case of *The King v. The Justices of Kent*, 14 East, R. 395, that *mandamus* would lie to compel the justices to hear and pass on an application of the journeymen millers to rate their wages, under an act which the justices had solemnly determined did not confer on them that power, and for which reason they had declined to hear the case on the merits. The case seems to be, in all respects, analogous to this."

"Original jurisdiction to award writs of *mandamus* upon these principles of the common law has been conferred on this court by the constitution and laws of this State; and, in accordance therewith, we say to the judge of the circuit court of Pulaski that he has the constitutional power to hear and finally dispose of the cause referred to as by an appellate court, and that it is his duty so to do."

In the case of *Page v. Clopton, Judge*, 30 Gratt. 415, this case is cited and approved by Judge Burks, who says: "If the conditions of the statute are satisfied, the right of the party is clear, and the duty of the judge is equally clear, and it is imperative. He has no discretion in the matter. The language of the law is, 'he shall sign.'" The language of the act of March 7th, 1884, is: "Any motion, suit, or other proceeding, pending in a corporation court, shall be removed, as of right, to the circuit court," &c. High on Extraordinary Remedies, chapter 1, section 24: "But the most important principle to be observed in the exercise of the jurisdiction by *mandamus*, and one which lies at the very foundation of the entire system of rules and principles regulating the use of this extraordinary remedy, is that which fixes the distinction between duties of a peremptory or mandatory nature, and those which are discretionary in their character. * * * Stated in general terms the principle is that *mandamus* will lie to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance. * * * But if, upon the other hand, a clear and specific duty is positively required by law of any officer, and the duty is of a ministerial nature, involving no element of discretion and no exercise of official judgment, *mandamus* is the appropriate remedy to compel its performance, in the absence of any other adequate and specific means of relief, and the jurisdiction is liberally exercised in all such cases." And the same writer, in section 230, says: "It has already been shown that, as to all matters of a judicial nature and resting within the limits of judicial discretion, *mandamus* is not an appropriate remedy, and that the courts uniformly refuse to interfere, by this species of relief, either to control or regulate in any manner the discretion of inferior courts as to matters properly presented to them in a judicial capacity. But it not unfrequently happens that duties devolve upon courts or judges, either by operation of law or by positive statute, which partake more of

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a ministerial than of a judicial nature, and where the duty is so plain and imperative that no element of discretion can enter into its performance. And while the courts uniformly refuse to interfere with the discretion of inferior tribunals in the performance of their duties, yet, as to acts to be performed by a court or judge in a merely ministerial capacity, or as to duties which are obligatory upon them by express statute, and as to which there can be no dispute and no element of discretion, *mandamus* is an appropriate remedy, and will be granted to compel the performance of the act or duty."

In the case of *Kent, Paine & Co. v. Dickenson*, Judge, 25 Gratt. 817, Judge Christian, for the court, says; "Original jurisdiction to award writs of *mandamus* upon the principles of the common law has been conferred on this court by the constitution and laws of the State; and, in accordance therewith, I think we must say to the judge of the circuit court of Charlotte that this cause is properly before him; and that he must go on and hear and finally dispose of the same. For that purpose a peremptory *mandamus* should issue."

And High, section 272, says: "The denial by a court of an absolute right conferred by statute has been held sufficient to warrant relief by *mandamus*."

These authorities, both of decided cases in this court, and of High on Ex. Legal Remedies, above cited and largely quoted from, are, we think, expressly in point, and rule this case.

As to the argument made by the respondent in his return to the rule *nisi*, that the defendant, by its appearance and submission to trial in the corporation court of Danville, had thereby waived its right of removal by motion and due notice, as of right, under the statute, we do not think it tenable or sound. There had been an ineffectual trial by a jury, who had failed to agree on a verdict, and who had been discharged, and the case was certainly *pending* in the corporation court at the time when the notice was given of the motion to remove the cause, under the statute, to the circuit court of Danville, and when

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the said motion was made and overruled in the said corporation court of Danville. .

Nor do we comprehend the force or admissability of the argument or assertion of the unconstitutionality of the act of 7th March, 1884, under which the motion was made for removal. It is argued that the constitution vests the corporation courts with exactly the same jurisdiction as the circuit courts, and that the statute in question contravenes this provision of the constitution and curtails the jurisdiction of the corporation court. This is not the effect of the statute, and could not be, unless it deprived the corporation court of the jurisdiction to hear and determine the cause, provided it was permitted, by the parties having the option, to remain in it for trial. The statute, while recognizing the equal and concurrent jurisdiction of the two courts to the fullest extent provided by the constitution, simply allows the parties the right of having their cause tried in the circuit court, if they prefer it.

The election of what court he will sue in is always exercised by the plaintiff in instituting his suit; and yet it will hardly be contended that this election by the plaintiff extended the jurisdiction of the court he sued in, and abridged that of the one he avoided. How, then, does the statute authorizing the right of exercising this election by removal, after the institution of the suit and while it is pending and untried, operate this effect? Other removals are provided for by the same section; and such laws, though long in existence and practice, have never been questioned or regarded as unconstitutionally affecting the jurisdiction of the court from which they permitted removal.

We are of opinion that the judge of the corporation court of Danville erred in refusing to remove the cause which was pending in said court, upon the motion of the defendant, as of right under the statute, to the circuit court of Danville; that he, as respondent to the rule *nisi*, has not made a good and sufficient return to the said rule; and that the said rule *nisi* must be made *peremptory*, requiring him, as said judge of said court,

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to remove this cause, upon the motion of the defendant, according to the law, to the circuit court of Danville. Let a peremptory *mandamus* issue.

MANDAMUS AWARDED.

Richmond.

STEARNS v. HARMAN.

JANUARY 8th, 1885.

1. EQUITY, JURISDICTION, AND RELIEF—*Quia timet*—*Cloud on title*.—On the principle of *quia timet*, a court of equity will entertain a suit by the owner *in possession* of land, to remove a cloud from his title, by annulling a deed that, by mistake or fraud, conveys the land to another, who makes adverse claim thereto, but brings no suit. *Carroll v. Brown*, 28 Gratt. 791.
2. EJECTMENT—*Adverse claimant*.—But under Code 1873, chapter 131, sections 4 and 5, the proper remedy is by an action of ejectment, where the owner holds the legal title, but has not actual possession, and another asserts an adverse claim to the land, but has not actual possession of it. In such case equity has no jurisdiction. *Harvey v. Tyler*, 2 Wallace (U. S.), 328.

Argued at Wytheville, but decided at Richmond.

Appeal from decrees of circuit court of Bland county, entered November 4th, 1883, and May 5th, 1884, respectively, in the chancery cause therein pending, wherein Franklin Stearns was complainant and A. Q. Harman was defendant.

The object of the suit was to annul a grant dated May 1st, 1880, from the Commonwealth to Harman for 371 acres of land, to which the latter asserted claim, but of which he had not actual possession, on the ground that the said 371 acres were embraced within a tract of 75,000 acres, which had, in 1795, been granted to Robert Morris, and had passed, by devise and deed, to the complainant, who, however, was not in actual possession thereof; and on the ground that the said junior grant *cast a*

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cloud on the complainant's title, which cloud he had a right, having no remedy at law, to come into equity to get removed.

The defendant demurred to the bill, and the court sustained the demurrer.

The complainant filed an amended bill, whereby he alleged, in addition to what was alleged in the original, that the defendant had for years known that the said 371 acres were embraced in the older grant, and had obtained the junior grant thereto fraudulently as to the complainant.

To the amended bill the defendant's demurrer was also sustained, and the complainant obtained an appeal to this court.

Opinion states the facts.

Kent & Williams Brothers, for the appellant.

Harman & Munsey, for the appellee.

RICHARDSON, J., delivered the opinion of the court.

In July, 1883, Franklin Stearns exhibited his bill against A. Q. Harman in the circuit court of Bland county, setting forth that said plaintiff, Stearns, is the owner in fee of what is commonly known as the "Phineas Thurston big survey lands," lying in the counties of Wythe, Bland, Giles and Pulaski, and part of a survey of 75,000 acres granted to Robert Morris, of the city of Philadelphia, assignee of Robert Pollard, which grant bears date 19th March, 1795.

To show the derivation of his title, the plaintiff exhibits with and as part of his bill—

1. A grant from the Commonwealth of Virginia to Robert Morris, for 75,000 acres, dated 19th March, 1795.

2. The will of Robert Morris, devising said land to his widow, Mary Morris, which was admitted to probate, in the county court of Wythe, on the 13th day of May, 1851, by authenticated copy.

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3. An authenticated copy of the will of Mary Morris, duly probated in the county court of Wythe, devising said land to her daughter, Maria Nixon.

4. Deed from said Maria Nixon, conveying said land to said Phineas Thurston, dated the 1st day of January, 1851.

And the plaintiff avers that he acquired complete title to said land, as thus transmitted to said Thurston, through the medium of a chancery suit brought and prosecuted in the circuit court of Wythe county, in which he was plaintiff and the said Phineas Thurston and others were defendants, which suit was brought to enforce the lien of a judgment held by him against said Thurston; that the land was regularly sold, under decrees pronounced in that suit; was purchased by said Stearns, and the same conveyed to him by commissioners appointed by the said court for the purpose; and the plaintiff exhibits with his bill a certified copy of the decrees and other proceedings in said chancery cause, together with a copy of the deed from said commissioners to him.

The bill alleges that while Thurston was the owner of the land he, by himself and by his agents and attorneys in fact, sold and conveyed considerable portions (there is no intimation of how much or where located) of said land; but that a large portion thereof remained unsold by said Thurston, which remainder was purchased by said Stearns, under decrees in the said chancery suit. And the bill also alleges that a portion of the land so purchased by Stearns lies on the north side of "Walker's Big Mountain," in Bland county, adjoining the lands "claimed or owned" by A. Q. Harman; that this land is in a state of nature—is wild, unimproved, uncultivated, and uninclosed; and that the legal seizin therein and thereto passed, under the grant aforesaid, to Robert Morris, and has, as before described, been regularly transmitted to and vested in said plaintiff, Stearns.

The bill then alleges: "That the said A. Q. Harman, on the 14th day of January, 1877, made a pretended entry of said

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wild lands adjoining his lands, and a pretended renewal or enlargement of said pretended entry on the 9th of June, 1879, and on May 1st, 1880, had surveyed 371 acres of said wild land, and obtained from the Commonwealth a grant therefor;" a copy of which grant the plaintiff exhibits with his bill. And the plaintiff in his bill insists that the complete legal title and seizin to said land having passed to and vested in the said Robert Morris, by the said grant to him, and the same having been regularly transmitted to said plaintiff, Stearns, said Harman took nothing by the grant to him for said 371 acres, part of the 75,000 acres granted to Robert Morris, and included in the part thereof purchased by said Stearns, as before stated. But the plaintiff alleges that said Harman asserts claim to the 371 acres granted to him, and though the same is a wrongful and illegal claim, it constitutes "color of title," and that the holding of same by actual possession by said Harman, for the period constituting the statutory bar, would ripen Harman's claim into a good title. The plaintiff also alleges that, by virtue of his older and superior title, *he is in the legal possession* of same; but says "Harman can press his claim by taking actual possession of said 371 acres granted to him, and thereby greatly and continuously annoy and harrass your orator, unless said pretended grant or patent be cancelled and annulled." And the said plaintiff says he is without relief at law; insists that he is entitled to come into equity for relief; and prays that the grant to said Harman for said 371 acres be set aside and annulled, and the cloud thereby cast upon the plaintiff's title removed, and for general relief.

The defendant, Harman, demurred and answered.

In his answer the defendant, among other things, denies the validity of the alleged Thurston title, and denies that the survey of 75,000 acres granted to Robert Morris ever has been or can be established; but says if the same were or could be established, that the same does not embrace the 371 acres granted to him as aforesaid. But it is unnecessary to look to the an-

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swer, as the cause went off in the court below on the demurrer.

The cause was first heard on the demurrer at the November term, 1883, of said circuit court, when the court sustained the demurrer; but on motion of the plaintiff, leave was given him to amend his bill, and the cause was remanded to rules for that purpose.

The plaintiff amended his bill, reäffirming the statements contained in his original bill, and charging in addition that the defendant Harman, at the time he made his said entry and survey and obtained his said grant for the 371 acres, knew and had for years known that the land so entered, surveyed, and granted to him was embraced in and constituted a part of the land known as the Phineas Thurston land, and that said Thurston or those claiming under him owned the same; that said Harman, in making his said entry and obtaining his said grant, with the knowledge aforesaid, committed a fraud upon said Thurston and those claiming under him; and that said Harman, with said knowledge of the facts, fraudulently, and for the improper and fraudulent purpose of seeking an improper advantage, and with intent to defraud, failed to give the notice required by the statutes of his intention to make said entry, for six months previous thereto to said Thurston; and for the reasons set forth the plaintiff avers and charges that the said patent to said Harman was obtained by fraud, and that the same is fraudulent both as to said Thurston and said Stearns, who has succeeded to and holds the title of said Thurston. And then in the amended bill the plaintiff further avers that, should it turn out in the progress of the cause that said Harman's position in relation to said land is an innocent one, and that he in fact did not know of the existence of the right and title of said Thurston to said land at the time he obtained said patent, the said Thurston being then and the said Stearns since that time the complete owner with the legal seizin thereof, and having paid all taxes thereon, both before and since the emanation of Harman's grant, that then, the said Harman having proceeded

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by mistake and misapprehension of the rights of said Thurston and said Stearns, the said patent is void as against said Thurston and the said plaintiff, Stearns.

Such is the plaintiff's claim, stated as near as may be, in the language of the bill.

The defendant, Harman, demurred to and answered the amended bill. In his answer he reiterates the matters contained in his answer to the original bill, and denies the fraud charged in the amended bill; denies all knowledge of the alleged rights of said Thurston and Stearns, or that they have any such rights; denies any mistake, and denies that he was required by any statute to give said Thurston and Stearns or either of them six months' notice, or any notice.

The cause came on again at the May term, 1884, of said circuit court, on the amended bill and exhibits filed therewith, and the demurrer to said amended bill and joinder therein; on consideration whereof the court entered a decree sustaining the demurrer and dismissing the plaintiff's bill; from which decree as well as from the former decree sustaining the demurrer to the original bill the case is here on appeal.

The sole question to be determined is one of jurisdiction. Has a court of equity jurisdiction to hear and determine the case made by the bill? In other words, had the plaintiff a complete and ample remedy at law? If the latter, then there is no error in the decrees complained of.

The demurrer, it is true, necessarily admits as true the facts stated in the bill, so far as they are relevant and well pleaded, but denies the sufficiency of the facts thus set forth to entitle the plaintiff to the relief sought. Whether the facts stated in the bill, so admitted by the demurrer to be true, entitle the appellant to the relief prayed for is, therefore, the only question to be here determined.

A very full statement of the appellant's case, as made by his original and amended bill, has already been set forth. It is impossible to scan the case thus made without at once discover-

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ing that the parties, neither of whom is in the actual possession, stand to each other in the simple relation of adverse claimants of the 371 acres of land in controversy. The appellant's contention is that this land is part of the 75,000 acres granted to Robert Morris, of Philadelphia, in 1795; that by the several devises and conveyances before referred to the legal titles to same have been regularly transmitted to and vested in him, and that he has the older and better title, coupled with the complete legal seizin, by reason whereof nothing passed by the Commonwealth's junior grant to the appellee, Harman. But, he says, Harman's patent, however wrongfully and illegally obtained, constitutes "*color of title*," that Harman is asserting claim to the land thereunder, and that if he should take actual possession, and hold for the period constituting the statutory bar, his title would thereby ripen into a good title. He says that thus a cloud is cast upon his title, that he is absolutely without remedy at law, and is entitled to come into equity to have the cloud upon his title removed.

Now, was the plaintiff below, the appellant here, without remedy at law? We think he was not. On the contrary, the question involved was purely one of title, and for the settlement of which the action of ejectment is a peculiarly appropriate remedy.

By section 4 of chapter 131, Code 1873, it is provided that no person shall bring such action (ejectment) unless he has, at the time of commencing it, a subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof.

Under this statutory provision, taking the appellant's case as stated in the bill, there can be no pretext for saying he had not, at the time of the commencement of this suit, a subsisting interest in the premises in controversy, for he asserts in his bill that he has a claim, backed by a complete legal title, and that the legal seizin or constructive possession is in him undisturbed by any actual adverse possession. This being so, upon proof of

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the case made by the bill, he unquestionably had the right at law, by this action, to maintain and set up his title to the interest claimed by him, to the exclusion of the adverse claim asserted by Harman, the junior claimant.

But the appellant insists that, as he has only the legal seizin unaccompanied by the actual possession, he has no right to maintain the action of ejectment as against one asserting an adverse claim, but not in the actual possession. This, however, is a clear misapprehension of his rights under the law, and is completely answered by the fifth section of the chapter (131) above referred to, by which it is provided, it is true, that the person actually occupying the premises shall be named defendant in the declaration; but goes further, and provides that if the premises be not occupied, the action must be against some person exercising acts of ownership thereon, or *claiming title thereto*, or some interest therein, at the commencement of the suit.

Looking again to the case stated in the bill, we find that there is a person *asserting claim of title* to the premises in controversy, and that person is Harman, the defendant below and appellee here. This being so, it is matter of surprise how the appellant could ever, with these plain provisions of the statute before him, have concluded that he was without remedy at law; and such, the legal remedy, being plainly not only given by statute, but exactly adapted to the particular case, it is equally plain and clear that a court of equity had no jurisdiction to entertain the case. In fact, if it were otherwise the great purpose for which the action of ejectment has been given—that, among others, of settling disputed questions of title and boundary—would be defeated, and the action rendered far less efficacious than it was intended to be, especially in Virginia. But, plain as the legislative intent appears in the unambiguous terms of the statute itself, we are not under the necessity of giving for the first time authoritative judicial construction thereto. This statute has passed under the scrutiny of the highest judicial

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tribunal of the land, and the view above expressed has been fully sustained thereby.

In *Harrey v. Tyler*, 2 Wall. U. S. R. 328, Mr. Justice Miller, delivering the opinion of the court, said: "The Code of Virginia, as well as that of several other States, allows the action of ejectment to be brought against persons claiming title or interests in the property, although not in possession. It says: 'The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising ownership thereon, or claiming title thereto, or some interest therein, at the commencement of the suit.'"

And the learned justice proceeds: "If, then, there was a part of the tract claimed by some person, on which there was no occupant, the case existed which the second clause of the section provides for. The policy of this act is obvious. It is that persons out of possession, who set up false claims to land, may, by a suit in ejectment, which is the legal and proper mode of trying title, be brought to this test. The act provides that such a judgment is conclusive against all the parties; and thus the purpose of the law, to quiet title by a verdict and judgment in such cases, is rendered effectual. The language of the Code of New York is identical with that of Virginia on this subject. And the construction we have given to it was held to be the true one by the supreme court of the former State." See *Boutyer v. Empie*, 5 Hill, 48.

Cases may and do arise in which the jurisdiction of equity readily attaches to remove a cloud from the title of the true owner of land. If the wrongful claim is founded in either fraud or mistake, and the rightful owner is so situated that he cannot bring ejectment, a court of equity will, upon a proper case made, take jurisdiction and extend relief, by causing the delivery up, cancellation, or rescission of agreements, securities, deeds, or other instruments. On this subject Judge Story says: "It is obvious that the jurisdiction exercised in cases of

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this sort is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, as it is technically called, *quia timet*—that is, for fear that such agreements, securities, deeds, or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost, or that they may now throw a cloud or suspicion over his title or interest.” 1 Story’s Eq. § 694.

Upon this principle was decided the case of *Carroll v. Brown*, 28 Gratt. 971. But there is a wide dissimilarity between that case and the case at bar. There the owner was in possession, and filed his bill to set aside a deed which had been put upon record, whereby the complainant’s land had been wrongfully conveyed to a purchaser at a tax-sale. Certainly a court of equity had jurisdiction in that case, because the owner was *in possession*, and could not bring ejectment against the adverse claimant, not in possession, to try the question of title; and the adverse claimant standing off, and content not to bring his action then against the owner, as he might have done (see section 5, chapter 131, Code 1873), thus showing that he was holding back for some sinister purpose, the tendency of which was to seriously impair if not to destroy the market value of the owner’s title. In the case at bar, whatever may have been the motives of the parties or either of them, and whether their acts are founded in fraud or mistake, the remedy, as we have shown, is complete at law. That remedy, by the appellant’s own showing, is by an action of ejectment—by which the question of title, between the parties, can be effectually put at rest.

In any view of the case it is clear that the plaintiff below, the appellant here, mistook his remedy, and sought the wrong forum. There is no error in the decrees appealed from or either of them, and the same must be affirmed, with costs to the appellee.

DECREE AFFIRMED.

Richmond.

CARTER & ALS. v. EDMONDS.

JANUARY 15th, 1885.

1. FIDUCIARIES—*Lunatic's committee—Ex-parte settlements.*—A confirmed report of an *ex-parte* settlement of a fiduciary's accounts is *prima facie* correct, and can be surcharged or falsified only by suit for the purpose within proper time. Code 1873 chapter 128, section 29; *Newton v. Poole*, 12 Leigh, 112; *Leake v. Leake*, 75 Va. 792. This is equally true *quoad* such settlements of the accounts of the committee of a lunatic.
2. COMMITTEE OF LUNATIC—*Ex-parte settlement—Antecedent debt—Statute of limitations.*—It is proper for such committee to include, in his *ex-parte* settlement of accounts as such, a debt due from the lunatic's estate to such committee before his appointment. Such, in fact, is his only remedy, as he could sue neither himself nor his predecessor. After confirmation of the report of the settlement, such debt would, like any other item of the account, be beyond the operation of the statute of limitations.
3. IDEM—*Witnesses—Competency.*—The committee of a lunatic is competent to testify as to a contract made by him with a former committee of the same lunatic concerning the latter's affairs.
4. IDEM—*Re-examination of witnesses.*—It is a general rule that a deposition once taken, cannot be re-taken without the leave of the court, which will always be granted whenever justice seems to require it. *Fant v. M. & M.*, 17 Gratt. 188.
5. LUNATICS—*Real estate.*—Code 1873, chapter 82, sections 49, 50, and 51, relating to sale, &c., of lunatics' real estate to pay his debts and maintain himself and family, does not apply to a case where *after death* of the lunatic it is sought to subject his real estate to the payment of his debts.

Appeal from decree of circuit court of Fauquier county, entered 15th September, 1882, in the cause of Mary E. Edmonds, plaintiff, against Robert Whitacre, administrator, and M. F.

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Carter, Helen Edmonds, Joseph C. Blackwell, and others, heirs of Sarah C. Carter, deceased, defendants.

Sarah C. Carter was adjudged a lunatic, and the defendant, Joseph C. Blackwell was appointed her committee, in 1860. By agreement with this committee the plaintiff, from 1863 until 1870, boarded, clothed, and cared for the lunatic, who was her sister, and who owned real estate near Delaplane, in said county, worth \$300 rental. In 1870 the plaintiff was appointed such committee, in the place of Joseph C. Blackwell, whose powers were revoked. At the date of her appointment the lunatic's estate was indebted to the plaintiff in the sum of \$1,727.01, for board and care. This sum was included in the plaintiff's first *ex-parte* settlement of her accounts as such committee, the report of which settlement was duly returned to and confirmed by the county court of said county. And annually afterwards the plaintiff regularly settled her accounts. In August, 1877, the lunatic died, indebted to the plaintiff in the sum of \$4,588.50, as she claimed, and she instituted said suit, in February, 1878, to subject the decedent's estate, real and personal, to the payment of her debts, including the plaintiff's, and to distribute the residue among the next of kin.

The cause was referred to a master, and the testimony of numerous witnesses (including plaintiff) was taken, chiefly as to the annual value of the lunatic's real estate, which went into the plaintiff's hands, as her committee, and of the board and care furnished the former by the latter.

The cause having been regularly matured for hearing, the circuit court, on 15th September, 1882, confirmed the master's report, adjudged, among other things, that the lunatic's estate was indebted to the plaintiff, her committee, in the sum of \$3,785.83, with interest, which embraces the said sum of \$1,727.01, and decreed the sale of the said real estate for the payment of said debts, and for distribution among the next of kin.

From this decree the said M. F. Carter, Helen Edmonds, and

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others, defendants below, obtained from one of the judges of this court an appeal and *supersedeas*.

Wm. H. Payne and R. Taylor Scott, for the appellants.

A. D. Payne and J. P. Jeffries, for the appellees.

LEWIS, P., delivered the opinion of the court.

It appears that the appellee, who in 1870 qualified as the committee of the lunatic, annually settled before a commissioner her fiduciary accounts, which were duly confirmed by the county court. At the time of her qualification there was due her (as she claimed), for the care and maintenance of the lunatic for several years, under agreement with a former committee, the sum of \$1,727.01, with interest. This sum she charged in her *ex-parte* settlements in her own favor against the estate of the lunatic. The latter died in 1877, at which time, as appears from the settled accounts, there was due the appellee the principal sum of \$4,289.89. The object of this suit was to subject the real estate left by the lunatic to the payment of this balance. The heirs-at-law, except the appellee, who was the plaintiff below, were made defendants. They answered, denying the claim, averring that the *ex-parte* settlements were erroneous, and relying on the statute of limitations. Much testimony was taken, and at the final hearing a decree was entered in the plaintiff's favor, from which decree the case is now here on appeal.

The statute provides that the report of the commissioner settling the accounts of a fiduciary, to the extent to which it may be confirmed, shall be taken to be correct, except so far as the same may, in a suit in proper time, be surcharged or falsified. Code 1873, chapter 128, section 29.

In *Newton v. Poole*, 12 Leigh, 112, it was held, in respect to an executor's accounts, that though great and numerous errors

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appear, or even though the executor appear to have taken an unfair advantage, and though he never returned to the court and did not exhibit to the creditors any inventory and appraisement of the estate, the audited accounts are yet to be taken as *prima facie* evidence, and to be corrected only so far as they are surcharged and falsified by proof. In delivering the opinion Tucker, P., said: "The audited account does not, as has been erroneously supposed, stand upon the footing of a *stated account* between the parties. The latter rests upon the supposed adjustment between the parties themselves; and if there be fraud, it is of course void *in toto*. The other rests upon the supposed integrity of an impartial tribunal, and is only to be corrected so far as it is proved to be erroneous, unless corruption in the tribunal itself can be established; for where the law authorizes any person to make an inquiry of a judicial nature, and to register the proceedings, the proceedings so registered are not only to be presumed to be true, but they are generally held to be the only legitimate medium to prove the result. Stark. Ev. part iv. page 1043." The same doctrine was held in the recent case of *Leake's ex'or v. Leake and others*, 75 Va. 792, and in other cases. And the same is true in respect to the settlements of a committee and all other fiduciaries, whose accounts are required by the statute to be settled before a commissioner, and returned to the proper court for confirmation.

It is insisted, however, that the item of \$1,727.01 was erroneously included in the *ex-parte* settlements, and is therefore not within the influence of the principles just adverted to. But this objection is not well founded. The sum was due for the maintenance and support of the lunatic by virtue of an agreement with a former committee, and was a charge not against the committee individually, but against the estate of the lunatic. *Barnum, &c., v. Frost's admr.*, 17 Gratt. 398. It was therefore properly brought into the *ex-parte* settlements. For how else was the committee to proceed? The debt was due, and she could not sue herself. Nor could she sue the

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former committee, for credit had not been given to him individually, and his powers as committee had been revoked. There was nothing, therefore, for her to do but to include the item in her accounts before the commissioner, in which it was her duty to show the exact condition of the estate, and thus to give to any person interested the opportunity to attack the settlement, who might see fit to do so by proper proceedings in time. And as the item was thus properly brought into the accounts, the defence of the statute of limitations was plainly unavailing.

The *ex-parte* settlements being *prima facie* correct, it devolved on the defendants to surcharge and falsify them. And this they have failed to do, except so far as the corrections made by the decree complained of extend. It was contended in the circuit court and also here that there was an agreement between the appellee and the former committee to board and maintain the lunatic at a fixed price—much less than the sum charged in the *ex-parte* settlements; and the testimony of Blackwell, the former committee, is to that effect. But this is emphatically denied by the appellee in her deposition, and the circumstances of the case tend to corroborate her statements. In addition to her own testimony is that of a number of intelligent and disinterested witnesses, who were examined in the case; and in the light of this testimony, there is little room for doubt that the sum allowed her by the decree complained of is reasonable and just. And the same must be said in respect to the sum ascertained by the decree as a proper charge against her for the annual rents and profits of the real estate.

But the appellants insist that the appellee was not a competent witness, and that their objection to her competency ought to have been sustained. This objection would be well founded if the lunatic could have been and had been a party to the contract. But as the latter was not *sui juris*, and the contract was with the former committee, there is no reason upon which the objection can rest, as was very properly held by the circuit court.

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Nor did the court err in its order allowing a reëxamination of the appellee as a witness. The order was made because, as recited therein, it appeared that by the inadvertence of counsel she had not been examined as to certain matters when her deposition was first taken. "It is a general rule," says Barton, "that without the leave of the court, for good cause shown, a deposition once taken cannot be re-taken, the object being to compel a full disclosure on one side before the other side proves his case, and to prevent the temptation to perjury that would be offered by giving opportunity to change the evidence to suit the emergencies of the case. But the courts possess much latitude in permitting a second examination; and when the circumstances of the case and justice require it, an order for the second examination of the same witness will be made, and unless palpably improper the appellate court will not for this cause reverse the decree." 2 Barton's Chy. Pr. 759; *Fant v. Miller & Mayhew*, 17 Gratt. 188. In the present case the reëxamination was confined to a single point to which, by the inadvertence of her counsel, as recited in the order, the attention of the witness had not been previously called. In granting the order, under these circumstances, the court cannot be said to have exceeded the limits of a reasonable discretion, and certainly did not commit a palpable error for which the decree should be reversed.

It remains to say that the provisions of the Code (chapter 82, sections 49 *et seq.*) relating to the sale of the real estate of an insane person, for the payment of his debts or to make provision for the maintenance and support of such person and his family, do not apply to a case, like this, where the real estate is sought to be subjected to the payment of debts after the death of the lunatic.

Upon the whole case we are of opinion that there is no error in the decree, and that the same must be affirmed.

DECREE AFFIRMED.

Richmond.

PRINCE WILLIAM SCHOOL BOARD V. STUART AND PALMER.

JANUARY 15th, 1885.

1. **LEGISLATION—*Constitution—Bequests for public uses.***—Before 1790 S. J. bequeathed £600 to the vestry of D. parish, in P. W. county, to be put out on real security, and the interest applied to educate poor children of that county. By an act of the Legislature, in 1790, the powers and duties of the vestry were conferred on the overseers of the poor of said county, and they lent the amount of said bequest, then £885, to C. B., and secured same on land in F. county. By an act of the Legislature, in 1819, the powers and duties of said overseers were transferred to the school commissioners of said county, who received the annual interest on said loan until 1860. C. B. died in that year, and his heirs conveyed the land to W. and J. G., subject to said lien. The latter sold the land, in 1863, to S. and P., and an act was passed by the Legislature, at Richmond, on 29th September, 1863 (see Acts 1863-'64, page 42, entitled "an act for the relief of W. E. and J. B. Gaskins"), authorizing them to pay into the literary fund the amount of said lien, and, upon the receipt thereof by the Second Auditor, the Attorney-General was authorized to release said land from said lien. Accordingly the amount was paid in Confederate currency, and on 10th October, 1863, the deed of release was executed. The land was then conveyed to S. and P. By an act of the Legislature, in 1872, the county school board of P. W. county became the successors of the overseers of the poor of said county, and in 1881 brought their bill in chance y, in the circuit court of F. county, to declare the said act of 29th of September, 1863, unconstitutional, and the payment to the Auditor void, and to annul the deed of release of 10th October, 1863, and to subject the land to the lien created by the deed of 20th November, 1790. The defendants demurred and answered. On hearing the circuit court decreed in accordance with the prayer of the bill. On appeal here—

HELD (by a majority of the court, LEWIS, P., and HINTON, J., dissenting):

Syllabus—Statement.

1. The act of the Legislature passed 29th September, 1863, is constitutional and valid.
2. Funds dedicated to public uses are entirely within the scope of the legislative powers of the General Assembly, and acts of legislation changing the custody of such funds, and directing payment thereof to the new custodian, and the execution of a release to the debtor are valid, and binding on all affected thereby.
3. Such acts come within the scope of the act of the restored government passed 28th February, 1866, validating "certain acts, contracts, and proceedings during the late war."
4. The case of the *Bank of Old Dominion v. McVeigh*, 20 Gratt. 457, reviewed and distinguished from the case at bar.

Appeal from decree of circuit court of Fauquier county, rendered 28th December, 1881, in the chancery cause of the county school board of Prince William county, plaintiff, against William A. Stuart, George W. Palmer, William E. Gaskins, and others, defendants.

The object of this suit, which is sequel to the case of *Stuart and Palmer v. Thornton and als.*, 75 Va. 215, was to declare unconstitutional the act of the legislature passed 29th September, 1863, at Richmond (see Acts 1863-'64, page 42, entitled "an act for the relief of William E. Gaskins and James H. Gaskins"), and to declare void the payment made to the Second Auditor of this Commonwealth by the said Gaskins, under the said act, in Confederate currency, of the amount of a lien on land in Fauquier county bought by them of the heirs of Cuthbert Bullitt, deceased, which lien had been created thereon by said Bullitt by deed of 20th November, 1790, to secure to the overseers of the poor of Prince William county the payment annually of the interest on £885, Virginia currency, which had been bequeathed by Samuel Jones to the vestry of Dettinger parish, in said county of Prince William, to be put out on real-estate security, and the interest applied to the education of the poor children of the said county, and to annul the deed of release of said land from the said lien, made 10th October, 1863, in pursuance of said act, upon said payment by

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the Attorney-General of this Commonwealth, and to subject the said land to satisfy the lien created by the said deed of 20th November, 1790. William E. and James H. Gaskins had sold this land to Stuart and Palmer, in 1863. The lien was an obstacle to the conveyance of title. The said act having been passed, and the payment made, and the release executed under it, they conveyed the land to Stuart and Palmer.

The defendants demurred to the bill and answered it.

The cause having been matured for hearing, the said circuit court decreed the act to be unconstitutional and the payment void, and annulled the deed of release, and directed the land to be sold to satisfy the lien.

From this decree Stuart and Palmer, the defendants below, obtained an appeal and a writ of *supersedeas*.

Opinion states the case.

Wm. J. Robertson and H. R. Gordon, for the appellants.

Eppa Hinton, for the appellees.

LACY, J., delivered the opinion of the court.

The case, briefly stated, is as follows: In August, 1881, the appellees, the county school board of Prince William county, filed their bill in the circuit court of Fauquier county to subject the land of the appellants, Stuart and Palmer, to the lien of a claim due them, in their official capacity, of £885.

Their contention is that one Samuel Jones having bequeathed this amount to the vestry of Dettinger parish, in Prince William county, to be put out upon real estate, and the interest applied to the education of the poor children of said county; that by virtue of an act of the legislature of Virginia of 1785 this fund passed from the hands of the vestry into the hands of the overseers of the poor of the county; that by the act of 1819 the fund passed out of the hands of the overseers

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of the poor of said county, and into the hands of the school commissioners of said county, for the education of the poor children. That by an act of the legislature of Virginia in 1863 it passed out of the hands of the school commissioners of the county into the hands of the Second Auditor, to be by him applied to the education of the poor children of Prince William county, as part of the literary fund of the State; and that the money was then collected and paid to the Second Auditor, and by the provisions of the said act the lien on this land was released. That subsequently, by virtue of the act of February 21st, 1872, they, the school board of Prince William, succeeded to all the rights and property held by any person for the benefit of public free schools in the said county of Prince William. That by the act of 1863 the money had been lost, and that the act of 1863 was a so-called law, by a so-called legislature of Virginia; that the so-called legislature of Virginia had no right to pass the act of 1863; that it was *ultra vires*—impaired the obligation of the contract; was unconstitutional, null and void, and the action taken under it of no effect whatever. That the release executed by the Attorney-General of the State, under the provisions of the said act, was of no effect, that the lien still subsisted, and that the sale subsequently made to the appellants, Stuart and Palmer, was subject to their lien, which they were entitled to receive, by virtue of the act of the legislature of 1872, mentioned above, and asking a sale of the land to satisfy the lien.

The appellants, Stuart and Palmer, demurred and answered, and set up their purchase, the act of the legislature of 1863, and the necessity of the sale, by reason of the war, which prevented any annual profit from the fund as it then stood for the benefit of the poor children.

But the circuit court of Fauquier sustained the plaintiffs, and decided in accordance with their contention; held the act of 1863 unconstitutional and void, and decreed a sale of the land

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to satisfy the said debt. Whereupon Stuart and Palmer applied for and obtained an appeal to this court.

The fund in question having been dedicated by the donor to the education of the poor children of Prince William county, to be put out by the vestry in that county, the act of 1785 transferred to the overseers of the poor, under the direction and control of the county courts, the powers of the vestries, which had been dissolved; and the custodian of the fund being thus changed, the same thing was done in 1819; and in 1863 when, it appearing to the legislature that the fund had become unproductive as to any annual rent or interest, it was collected and placed in the hands of the Second Auditor, to be by him applied in accordance with the will of the donor.

This act of 1863 is declared void—first, because it was done by the State government while in a state of war with the Federal government.

But that claim cannot be maintained at this day. Such acts of this legislature are expressly recognized by the act of the restored government of February, 1866. And in this court it has been held that the government, which had its seat at Richmond during the late civil war, was a *de facto* government, and all its acts for the protection of civil rights are held valid, and all contracts arising out of the laws of such a government will be enforced to the extent of their just obligation.

Christian, Judge, says in the case of *Dinwiddie County v. Stuart, Buchanan & Co*, 28 Gratt. page 540: "Such laws and contracts are not only declared valid and binding by the decisions of this court and of the supreme court of the United States, but by the express statutes of the restored government of Virginia, whose constitutionality have never been questioned in this court or elsewhere." See, also, the case of *Texas v. White*, 7 Wallace.

We think the act of the legislature of 1863, not being in anywise in aid of the war against the United States, but being an

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act for the protection and disposition of rights of property, as valid, as the acts of an actual government, as any other act referred to, as affecting the property rights involved in this case.

As to the other question—that the act was unconstitutional, because it impaired the obligation of the contract, and was *ultra vires*—it may be observed, as was contended here in argument by the appellees, that this fund was dedicated to a public use by the donor, and placed in the custody of a body, which afterwards ceased to exist, by reason of changes in the structure of the government, and it became necessary for the Legislature to place this and similar funds in the custody of others; and so, from time to time, these custodians have been changed by the legislature, until it is claimed by the appellees that *they* are entitled to hold it by reason of an act of the legislature; and it is only by virtue of this act of 1872 that the appellees could have any standing in court whatever.

The contention of the appellees would seem to be based upon the idea that this fund, having been once invested, it could never be collected but by the express terms of the contract itself. Cuthbert Bullitt, his heirs and assigns, had the right to pay the debt whenever they thought proper. Their assignees did pay this sum, by authority of the legislature, into the hands designated by law to receive it.

But it is objected that they paid it in Confederate money then greatly depreciated. They paid it in the only currency then in use, and by authority of law. The fund in the then condition of the country was wholly unproductive. It was a fund peculiarly under the control of the legislature, having been dedicated to public uses, and belonging to a class of citizens under the special protection of the legislature. It was a fund which the legislature many years before had been obliged to take charge of to save it from loss. For nearly one hundred years it had been in such hands as the legislature had in its wisdom placed it; and when the legislature, in a time of war and the greatest uncertainty as to the stability of all values, thought

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proper once more to stretch forth its hand and place it in safe custody, to be applied, as before, in accordance with the terms of the trust by which it was created, it is said that this act was disastrous, that it resulted in loss, that it impaired the contract, and is unconstitutional and void. And this claim is sustained by the circuit court.

The act by which the appellees claim to be entitled to this fund is a general act of the legislature, passed subsequent to the act by which the public officer named in the former act had received and applied this fund to the end and in the manner provided by the former law. At the time of the passage of the law which devolved the rights of the school commissioners upon them, the county school board, as to funds in the hands of the former, the school commissioners, had been superseded as custodians of this fund, and another custodian had been appointed to receive and disburse it.

The fund in question having been dedicated by the donor to a public use, for the benefit of persons who were under the special charge of the legislature, as under an ancient act, referred to above, where the vestries had ceased to be public boards, with public duties, the legislature had substituted another public board of officials to discharge the public duties formerly devolved upon the vestries; so, subsequently the legislature had substituted the last, the overseers of the poor, by the creation and designation of still another public board, to discharge these public duties; and so, still later, according to its discretion, the legislature had designated another public official to substitute the school commissioners, and to perform these public duties as to this public fund, for the benefit of a particular class of persons, under the control and protection of the State government, and of the legislature, as the supreme law-making power of the State.

If this last act had proved advantageous to the fund, and the changed investment had, in the light of after events, turned out to be safe and profitable, there would be none to question the

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act. But because the act has proved injurious, it is now claimed to be *ultra vires* and void. The act of the legislature of 1863, having been concerning a public fund, designated for public uses, was entirely within the scope and compass of the general legislative powers of the legislature, devolved upon it by the constitution, and is valid and binding upon the class affected. That the act proved to be unwise in the light of results is immaterial; it cannot be altered or repealed. Under the authority of the actual government of the State the debtors in question paid the debt they owed to the public officer appointed by law to receive it, and by authority of the supreme power of the State their title to the land in question was perfected under the very terms of their contract, which provided that they should have the right to pay this debt at their pleasure.

Third persons, acting under the ægis of the State, have purchased this land. They paid a valuable consideration, as agreed on at the time, which was then equal in value to what they received, and their rights are to be protected, and they cannot be required to pay a second time, or surrender their land, upon the assumption that the legislature of Virginia, in 1863, was only a nominal body, without lawful authority. That body at that time had the power to enforce its enactments, and did enforce them against all comers. The government then existing was overthrown, and a new government established in its stead, under which we now live; and among its first acts was an act declaring all such domestic acts valid and binding, and its acts of such a character and the contracts made thereunder have been enforced to the present time by all the courts when they have been called in question, both State and Federal.

The case of the *Bank of Old Dominion v. McVeigh*, 20 Gratt., has been much relied on to sustain the ruling of the circuit court in this case. But an examination of that case will show a very different case from this. The fund in that case was in no sense a public fund, dedicated to public uses, which had been from its creation under the control and in the custody of public

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officials of the State, created and empowered by the legislature. The fund in that case was a debt due to a person (a corporation) outside of the State, so far as the powers of that legislature extended in the exercise of their actual powers. The debtor was a citizen of the State, within the lines of the actual government, and under the sanction of the legislature the debtor was authorized to pay the debt to some other person than the creditor; and it was not paid to the creditor at all, nor to any person authorized by it to receive the debt. This payment was held by a majority of this court to be no payment of the debt.

That case bears but little analogy to this, where the legislature changed the custodian of a public fund, appointing one public officer to substitute another in the discharge of a public duty, and authorized the payment of the debt, and its application in accordance with the terms of the instrument by which it was created. This was the exercise by the State of such paternal or tutorial power over rights and interests of the poor children of Prince William county as appears to be clearly within the power of the sovereign, to be exercised by general laws, and under the peculiar circumstances of this case, by a special act of the legislature.

It is an agreeable and pleasing reflection, in contemplating the results of this case, that if, in the exercise of this paternal solicitude by the State, anything appears to have been lost to the poor children of Prince William county as wards of the State, the growth of a wider benevolence in the administration of the offices of the State toward this class of her citizens has more than compensated the loss of this fund for the education of the poor children of that county, in the widespread and enduring blessings of a general free-school system erected and ordained by the State in the general exercise of this paternal power.

But it is not our province to look into the motives of the legislature. Courts are not at liberty to inquire into the proper

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exercise of power by the legislature in a case where the latter have been acting within their constitutional limits. They are bound to presume that the legislatures have exercised the proper discretion. Such an exercise of power within its constitutional limits, it has been held, is so conclusive that, though the legislature should, from any cause, do injustice to an individual, there is no court or other power in the government that can apply a remedy or administer relief. And it is not in the power of any court to say that a legislative act is void because it has not proven in after time to be judicious.

We think the act of the Legislature in question valid and binding, and the decree of the circuit court of Fauquier, declaring the same unconstitutional, void and of no effect, is wholly erroneous, and the same must be reversed and annulled.

FAUNTLEROY, J., and RICHARDSON, J., concurred with LACY, J.

LEWIS, P., dissenting, said:

I dissent from the opinion which has just been read. To my mind the propositions it announces are no less novel than startling, ignoring, as it does, the constitutional safeguards of the property rights of the citizen, and that, too, on the ground that those whose rights are alleged to have been invaded are incompetent to act for themselves. I had supposed that the disabled were especially entitled to the "protection of the laws." But the opinion just read seems to assume that to a case like this the fundamental guarantees do not extend; that the beneficiaries here are the wards of the State, and that therefore their rights of property are left to the arbitrary discretion of the legislature.

It is said, in the first place, that the bequest in question was for public purposes. But if by this it is meant to say that the State in its political capacity was beneficially interested as a party under the will of Samuel Jones, and could therefore sub-

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stitute, in place of the testator's directions, the will of the legislature, the proposition is unfounded. The fact that the object of the bequest was the education of a certain class, in a particular community, did not make the trust in its character any the less private. This is well-settled law, and need not be dwelt upon. A contrary principle, says Chief Justice Marshall, has never been asserted or recognized. *Dartmouth College v. Woodward*, 4 Wheat. 518, 637, 670. Here the estate bequeathed was the testator's own property—not dedicated to the public, but to be secured and its income appropriated in the manner and for the purposes directed by the will. The bequest was therefore plainly within the protection of the law securing the rights of private property, and the act in question, impairing the rights of the parties, as plainly unconstitutional and void.

In England and in this country the right to private property has always been regarded as a sacred right, "not introduced," as was said in an early case, "as the result of princes' edicts, concessions, and charters; but it was the old fundamental law, springing from the original frame and constitution of the realm." *Nightingale v. Bridges*, 1 Shower's Reports, 138. Its protection is guaranteed by *Magna Charta*, and in some form or other by the constitutions of the various States and of the United States. "It may be received," says Chancellor Kent, "as a proposition universally understood and acknowledged throughout this country that no person shall be taken or imprisoned, or dis-seized of his freehold or estate, or exiled or condemned, or deprived of life, liberty, or property, unless by the law of the land or the judgment of his peers." 1 Kent's Com. part iv, marg. p. 13. "By the law of the land," said Mr. Webster in the *Dartmouth College* case, whose definition is often quoted, "is most clearly intended the general law: a law which hears before it condemns: which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything

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which may pass under the form of an enactment is not therefore to be considered the law of the land."

The constitution provides that the legislature shall confer on the courts the power to direct the sale of estates of infants and other persons under legal disabilities, but shall not by special legislation grant relief in such cases or in any other case of which the courts or other tribunals may have jurisdiction. Article V, section 20. The same provision is contained in the constitution of 1851, article IV, section 35. But subject to this restriction, the legislature may by special enactment adopt measures for the management and control of the estates of persons not *sui juris*, in cases where judicial inquiry is not essential, and the interests of such persons require it. Cooley's Constitutional Limitations (fourth edition), marg. page 97; Potter's Dwarris on Stats. 488. This is done in the exercise of a tutorial power, as *parens patrie* or universal trustee, which under our system of government devolves upon the legislature. *Gallego's ex'ors v. The Attorney-General*, 3 Leigh, 450-482; *Savings Bank v. The United States*, 19 Wall. 227-239. But the power is to be exercised for the benefit of the *cestuis que trust*, and never to the prejudice of their substantial rights. And this is abundantly shown by the authorities relied on by the appellants themselves.

Thus, in the leading case of *Rice v. Parkman*, 16 Mass. 326, decided in 1820, a private act of the legislature of Massachusetts, authorizing a guardian to sell the real estate of his wards, and directing the proceeds to be put at interest, on good security, was held to be valid, on the ground that the power exercised was not judicial in its character, and rested in the legislature "as the general guardian and protector of those who are incompetent to act for themselves." But while this is so, "no one imagines," said Chief Justice Parker, in delivering the opinion, "that under its general authority the legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested." To the same effect

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is *Cochran v. Van Surlay*, 20 Wend. 365, in which case a similar act of the legislature of New York was sustained by the court for the correction of errors. The act was held to be clearly within the powers of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs. "But even that power," said the Chancellor, speaking for the court, "cannot constitutionally be so far extended as to transfer the beneficial use of the property to another person, except in those cases where it can be legally presumed the owner of the property would himself have given the use of his property to the other, if he had been in a situation to act for himself." So, upon the same principles, in *Stanley v. Colt*, 5 Wall. 119, an act of the legislature of Connecticut was sustained by the supreme court of the United States, which authorized a sale of certain real estate which had been devised for charitable purposes. But the legislature was careful to provide that the proceeds should be invested in interest-bearing bonds, to be secured by mortgage on real estate of double the value of the sum invested, and that the interest should be applied for the same purposes and in the same manner as the income of the real estate was by the will directed to be appropriated. The same doctrine has been held in numerous cases. *Solier v. The Mass. General Hospital*, 3 Cush. 483; *Blagge v. Miles*, 1 Story, 426; *Bambough v. Bambough*, 11 S. & R. 191; *Darison v. Johnnot*, 7 Met. 388; *Doe v. Douglass*, 8 Blackf. 10; *Leggett v. Hunter*, 19 N. Y. 445; *Norris v. Clymer*, 2 Barr 277.

In *Wilkinson v. Leland*, 2 Pet. 627, also relied on by counsel for appellants, an act of the legislature of Rhode Island, confirming a sale of real estate by a foreign executrix for the payment of debts of the testator, was held to be valid, the same not being a judicial act in its character, but the exercise of legislation. But in delivering the opinion of the court Mr.

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Justice Story took occasion to use this emphatic language: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention." And in *Calder v. Bull*, 3 Dall. 386, Mr. Justice Chase said: "I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State. * * * There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to take away that security for personal liberty or private property for the protection whereof the government was established."

Applying these principles, it is plain, I think, that the debt in question has not been discharged. The record shows that, by the contract of the parties, it was payable in gold or its equivalent, and as directed by the will was amply secured by a mortgage on real estate. Upon the application to the legislature, not of the *cestuis que trust*, or any one representing them, but of the debtors themselves, and without any reason save the convenience of the latter, leave was granted them to discharge the debt to the Second Auditor, as a substituted trustee or agent, by a payment in Confederate currency, worth at the time, perhaps, not more than one-fifteenth of its face value. And the money, when received, to be invested, not necessarily in real estate or other safe securities, but at such time and in such manner as the substituted trustee might see fit. In point of

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fact, he did not invest it all, and the fund was lost by the result of the war. If this did not impair the substantial rights of the parties, it is impossible to conceive how rights can be impaired. What difference, then, does it make that, by the contract of the parties, the obligors had the privilege to pay the debt when the act was passed? The contract, as I have said, was to pay, not in a depreciated currency, but in lawful money of the United States, and nothing else. And what difference does it make that, when the act was passed, the county of Prince William was in the occupancy of the Federal troops? If such was in fact the case, it only showed that the fund, if collected, could not then be used for the purposes designed by the testator, and that its collection, therefore, could in no wise promote the interest of the *cestuis que trust*.

But there is an additional consideration, which seems to me conclusive of the case, and that is that the act in question is in contravention of the constitution of the United States, which inhibits the States from passing any law impairing the obligation of contracts, or making anything but gold or silver coin a legal tender in payment of debts. Article I, section 10. The act, it is true, does not expressly authorize a payment in Confederate currency, but such undoubtedly was the intention of the legislature, inasmuch as no other currency was in circulation within the Confederate lines. If the intention were otherwise, then the payment, which was made in that currency, was not pursuant to the act, and the debt has not been discharged. Such was the view taken by this court of an act, passed during the war, authorizing payment to a branch bank, if within the Confederate lines, of antecedently contracted debts due the mother bank within the Federal lines. *Bank of the Old Dominion v. McVeigh*, 20 Gratt. 457. Under that act certain notes due the mother bank, which had been executed before the passage of the act, were paid in Confederate currency at a branch bank within the Confederate lines. In a suit on the notes by the bank, after the war, the defendant in his defence relied on

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the act. The circuit court sustained the defence, but the judgment was reversed. Judge Christian, in delivering the opinion, said: "It is difficult to conceive how any law could be framed which more plainly and palpably violates that provision of the constitution of the United States which declares that no State shall pass any law impairing the obligation of a contract.

* * * It is true the act does not, in terms, authorize payment in Confederate money; but it is notorious, and is part of the current public history of the times, that the only currency of the country, within the lines of the Confederate armies, was Confederate treasury notes, and it is equally a part of the current public history that such currency was greatly depreciated at that time. * * * The act either authorized the payment in Confederate currency, or it authorized the payment in legal currency. If the authority was to pay in legal currency, then the defendant in error [the debtor] has not complied with the requirements of the act; and if the act (as construed by the court below) authorized the payment of the debt in Confederate currency, which was contracted to be paid in gold or its equivalent, then it is clearly unconstitutional and void, because it is an attempt to make a worthless currency a legal tender. In either or any view of the case the debt has not been discharged, but is still due and unpaid." It is difficult to see how any language could be more appropriate than this to the case in hand.

It is insisted, however, that the fund became subject to the absolute control of the Legislature because the bequest, which was originally void for uncertainty, acquired vitality only by the action of that body. But this position is unsupported by principle or authority. The answer is that the legislature having seen fit to interpose and give effect to the charity, without reservation, the parties in interest thereby acquired vested rights which could not be impaired by subsequent legislation. A similar argument, in respect to a legislative grant, was unsuccessfully urged in *Terrett v. Taylor*, 9 Cranch, 43, in response

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to which the court said: "We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its nature, and held only *durante bene placito*. Such a doctrine * * * is utterly inconsistent with a great and fundamental principle of a republican government—the right of the citizens to the free enjoyment of their property legally acquired." See also *Fletcher v. Peck*, 6 Cranch, 87–133; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Regents of the University v. Williams*, 9 G. & J. 365; Cooley's Const. Lim. (fourth edition), 274, and cases cited.

A case in point is *Brown v. Hummel*, 6 Penn. St. 86. There certain estate was devised to establish a charity for the education of poor and orphan children. The will appointed trustees, and contained instructions for the perpetuation of the trustees and the general management of the trust. It also directed that an orphan house should be erected, and that no part of the estate devised should be sold or severed from the orphan house. After the testator's death, by an act of the legislature, the trustees were incorporated. And afterwards an act was passed providing for the appointment of trustees under the will in a manner different from that directed by the will, and authorizing a sale of a portion of the real estate. This act was assailed as an unwarranted interference with the rights of the parties, and it was unanimously held by the supreme court of Pennsylvania to be unconstitutional and void. The court said: "That the grant of a corporation for charitable purposes is a private grant, and in law considered and protected as a contract, is so fully established by authority as to require only a glance at the subject." And it further said: "But, in addition to excluding the old trustees and the principal from their stations, the act in question, on its face, alters the testator's will. Where this power was or is derived we are at a loss to perceive. If the legislature, by *ex-parte* enactment, can alter the will of a private individual, whose will shall escape? On whose will shall the hand of legislative innovation next be laid? What

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private charity will next be disturbed and invaded? If the legislature can alter one man's will, by license of the constitution, they can alter the will of every man."

These remarks are no less applicable to the present case. By the will of Samuel Jones, the fund was directed to be put at interest, and secured on real estate. By the act of 1863 no such direction was given, although authority was given to collect the fund. In consequence of that act the fund was lost, and the loss is now held to fall on the innocent and no less-deserving beneficiaries. I do not so read the constitution. I concur with the circuit court, that the act is unconstitutional, null and void.

It seems to be supposed, however, that the loss sustained has been more than counterbalanced by the benefits derived from the subsequent establishment of the free-school system in the county of Prince William. This may be true, and the argument would be entitled to weight if it were at all germane. But the doctrine of set-off has no application to a case like this.

I will only add that, in my opinion, the remaining objections to the validity of the act are not well founded. It must be held, I think, that the county of Prince William, during the entire period of the war, was subject to the jurisdiction of the State government established in this city. And there is nothing in the act, either in its object or by reason of the character of that government, to exclude it from the operation of the rule laid down by the supreme court of the United States in *Keith v. Clark*, 97 U. S. 454, and other cases there cited.

I think the decree should be affirmed.

HINTON, J., concurred with LEWIS, P.

DECREE REVERSED.

Richmond.

MOSBY AND WIFE v. WITHERS' EX'ORS AND ALS.

JANUARY 15th, 1885.

1. PRACTICE IN CHANCERY—*Plea of another suit pending.*—Where in suit in equity plea is presented of another suit in equity pending in same court, between same parties, concerning same subject, it is not error to reject the plea, consolidate the causes, and proceed in them as in one cause.
2. IDEM—*Judicial sale—Re-sale.*—At judicial sale title is retained, bonds with personal security are taken, and, as additional security, collaterals are assigned by purchaser to commissioner. It is not error, in such case, for the court, without first exhausting the bonds and collaterals, to decree a re-sale of the land unless within a prescribed period the purchase-money in arrears shall be paid; especially where the commissioner has reported that the collaterals cannot be made available without a chancery suit.
3. IDEM—*Amendment of pleadings.*—Where, from a plea, which is unsustainable by evidence, or rejected as making no lawful defence, it nevertheless appears that certain necessary parties have been omitted, it is right to allow the bill to be amended by inserting the omitted parties.

Appeal from three decrees of circuit court of Culpeper county, entered 21st November, 1873, 8th June, 1877, and 9th June, 1882, respectively, in the chancery cause of *Withers' ex'ors and als. v. Withers and als.* James Withers died, in Culpeper, testate, in 1861. His executors, Nelson and Rixey, sold his farm near Culpeper Courthouse, known as "Catalpa," to his widow. Mrs. Withers not having paid all the purchase-money, the executors, in 1872, instituted, in the county court of said county, a chancery suit to subject "Catalpa" to sale for the unpaid purchase-money, which suit was moved to the said

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circuit court in August, 1873. In October, 1873, a suit in chancery was instituted in the circuit court of said county by same parties against same defendants for the same purpose. In the last suit, at November term, 1873, the defendant, Mrs. Withers, tendered several pleas setting up the pendency of the other suit aforesaid. The court rejected the pleas of another suit pending, consolidated the causes, and proceeded in them as in one. It treated one plea as a demurrer for want of proper parties, and allowed plaintiffs to amend their bill, and insert the names of the omitted parties. It held that the last plea, which was to the effect that in the suit in the county court it had been adjudicated that "Catalpa" should *not* be sold to pay the unpaid purchase-money, &c., was not sustained by the evidence.

By decree of 8th June, 1877, it was directed that said land be re-sold, unless within sixty days Mrs. Withers paid the purchase-money then in arrears. It was sold on 8th September, 1878, to Jannette A. Mosby, wife of the appellant, Jacob J. Mosby. The purchaser paid the cash, and gave bonds, with personal security, for the deferred payments, and also executed a deed of trust on her interests in certain Grigsby and Ficklin estates, as collateral security. The sale was confirmed. But the deferred payments not having been made, and the commissioner who made the sale having reported that nothing could be realized out of the trust-deed without a chancery suit, a rule was served on Mrs. Mosby to show cause why "Catalpa" should not be re-sold. And despite her objection that the remedy on the bonds and trust deed executed to secure payment of the deferred instalments of the purchase money should be exhausted, before proceeding against the land itself, a decree was pronounced on 9th June, 1882, directing such re-sale unless the amount in arrears was paid within a given time.

From this decree Jacob J. Mosby and Jannette, his wife, obtained an appeal and *supersedeas* from one of the judges of this court.

J. C. Gibson, for the appellants.

G. D. Gray and *J. G. & W. W. Field*, for the appellees.

FAUNTLEROY, J., delivered the opinion of the court.

The first of the decrees which are complained of—that of November 21, 1873—was an interlocutory order of the court overruling sundry pleas offered by Ellen A. Withers and J. J. Mosby to a bill of complaint filed against them in this cause by Lewis P. Nelson and John H. Rixey, executors of the will of James Withers, deceased, as not being sustained by the evidence, and giving to the plaintiffs in said bill leave to amend their bill by the insertion of the names of certain parties who were devisees and beneficiaries under the will of their testator, James Withers, deceased.

The purport of the said rejected pleas was the alleged pendency of another suit between the same parties, in the same court, for the same subject matter with this suit; but the court, upon the suggestion of parties, consolidated the causes and proceeded in them as one cause. In this there is no error.

The decree of 8th June, 1877, was an order in the cause, that unless the said E. Adelaine Withers, or some one for her, shall, within sixty days from the rising of the court, pay over certain sums, or portions of the purchase money, for the tract of land which she had purchased under a decree of the said circuit court, as indicated in said decree; then, for her said default, the land, or so much thereof as should be necessary, should be re-sold. This was a proper order in the cause, and simply enforced compliance with the terms of sale made under the decree of the court, by a re-sale in default of payment by the purchaser, E. Adelaine Withers, and her surety, J. J. Mosby.

Mrs. E. A. Withers, the purchaser aforesaid, did make default in compliance with the terms of her purchase, and the land was re-sold under the decree of the court, and was purchased by

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Mrs. Mosby, the wife of J. J. Mosby. She failing to comply with the terms of her purchase, when the payments became due, a rule was awarded by the court against her to show cause why the land should not be re-sold. She showed no sufficient cause, in the judgment of the court, and for her default the decree of June 9th, 1882, was entered, ordering a re-sale. This is the last of the decrees complained of.

The ground of error assigned against the last decree is that the court should not have decreed a re-sale until Mrs. Mosby's interest in the Grigsby estate and in the amount due from George Ficklin's estate (which she had assigned or lodged with the commissioners of the court as collaterals to her purchase-money bonds) should be realized, and applied to the discharge of her purchase-money bonds for the tract of land sold by the court, and bought by her as aforesaid. In other words or effect, that the court erred in resorting to the primary subject—the land sold under its decree by its commissioners, without first and finally running down and realizing or exhausting these collaterals to the purchase-money obligations of the purchaser. The real and only question presented in this record is, whether a chancery court, under whose decree land is sold upon terms, and a reservation of lien upon it, can enforce the terms of sale when default is made in payment of the purchase-money? But, in this case, the trustee of Mrs. Mosby's interest reported to the court before the decree for re-sale, which is complained of, was pronounced, that he had made proper effort to collect from the Grigsby estate, but without success; and the Ficklin assets were locked up in chancery suits, then pending, with doubtful issue, and without definite prospect of realizing the fund.

We find no error in the decrees of the circuit court of Culpeper complained of, and they must be affirmed.

DECREES AFFIRMED.

Richmond.

SALAMONE v. KEILEY AND ALS.

JANUARY 15th, 1885.

1. CONSTRUCTION OF STATUTES—*Married Woman's act*—*When she may sue and be sued at law*.—Act approved April 4th, 1877, amended March 14th, 1878 (Acts 1876-'77, page 333, and Acts 1877-78, page 347), except that it confers on married women the right to sue and the liability to be sued *at law* on contracts made by her in relation to and for the disposal of her separate property, and on contracts made by her as a sole trader, confers no power or liability on her beyond what she had prior to its passage as to her separate estate, or what she had by the terms of settlement upon her.
2. PRACTICE IN CHANCERY—*Bills without equity aided*.—Where a bill fails to state a case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been made in the pleadings. *Green & Suttle v. Massie*, 21 Gratt. 356: But a defective bill may be aided by the answer and the evidence.
3. PRACTICE AT LAW—*Willful torts*.—The proper remedy for a mere willful tort is by action at law.
4. EASEMENTS FOR SUPPORT—*Remedy*.—Every person is entitled *ex jure natura*, to support for his land from the adjacent or subjacent soil. And when deprived thereof through the willfulness, negligence, or want of care and skill of another, he is entitled to compensation in damages; and usually his remedy is by action at law. *Stevenson v. Wallace*, 27 Gratt. 77.
5. IMPROVEMENT OF PROPERTY—*Implied contract*—*Breach*—*Remedy*.—Where one undertakes to improve his own land, he impliedly contracts to use due care and skill, and to answer to the adjacent land-owner for the consequences of his want of such skill and care. Where there is a breach of this implied contract, the party injured may waive the tort and maintain an action as for a breach of assumpsit.
6. EQUITY JURISDICTION AND RELIEF—*Trustee and feme covert c. q. t.*—

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Improvement of trust subject—Defect of care and skill—Remedy.—

Where a trustee and his *feme covert c. q. l.*, jointly undertake to improve the lot held by him in trust for her separate use, and in so doing fail to use due care and skill, whereby the owner of the adjacent land is damaged, a court of equity hath jurisdiction to ascertain and allow the claims of the injured party for compensation, and to subject the trust property to its satisfaction—either because of the trust, or because of the separate estate involved in the litigation—each being equally a subject of equity jurisdiction.

Appeal of C. C. Salamone from a decree entered June 25th, 1882, against him by the chancery court of the city of Richmond, in a certain cause wherein he was complainant, and A. M. Keiley, trustee for Theresa Barratta; said Theresa Barratta and her husband, Angelo Barratta, were defendants. The record discloses the following facts:

Angelo Barratta, by deed to A. B. Guigon, trustee, dated 20th May, 1869, made a post-nuptial settlement on his wife, Theresa Barratta, of certain property for her sole and separate use and benefit, free from all debts, liabilities and control of her then or future husband; she to possess it and receive the rents; the trustee to convey as she might direct in the event of a sale thereof by her, and receive and pay the proceeds to her to dispose of as she might see fit, she being empowered by said settlement to carry on business with the proceeds and act in regard thereto in all respects as if she were a *feme sole*.

Of the property thus settled were two adjoining lots, on Franklin street, near Shockoe creek, in the city of Richmond. On the eastern lot was a substantial brick store-house; on the western, only wooden structures.

By deed dated December 13th, 1870, the trustee, acting under the written directions of the *cestui que trust*, conveyed to P. Larocco and F. A. Rhio the eastern lot without reserving any right to excavate on the lot retained. These grantees, by deed of June 12th, 1871, conveyed the eastern lot to the appellant, C. C. Salamone, with the usual covenants of title, but

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without reservations of any kind. Guigon having died, A. M. Keiley was substituted as trustee.

The wooden buildings on the retained (western) lot afforded no support to the brick store-house on the lot sold. These wooden buildings were pulled down in 1871, and the lot whereon they had stood, which was lower than the level of Franklin street at that point, was partly filled up with dirt.

In 1873 a brick house was built by Mrs. Barratta on her lot, the eastern wall of which was built against the western wall of Salamone's house, and contributed to the support of the latter. This new house was several years later removed by Mrs. Barratta, with the concurrence of her trustee, for the purpose of erecting another in its place. A ditch or trench for the foundation of the eastern wall of the proposed new house was dug by Mrs. Barratta's employés alongside of and immediately contiguous to the foundation of Salamone's western wall, and was several inches deeper than the latter, but no offsets or other supports were left or constructed to sustain Salamone's wall. Whilst this was the situation, there came on the night of the 30th of August, 1880, a heavy rainfall, which washed away the earth from under the foundation of Salamone's western wall and caused it to fall, and shortly thereafter the destruction of the house. But that western wall of Salamone's house had previously to said excavation become cracked, bulged out from the perpendicular, weak and insecure; and before digging the ditch or trench, Mrs. Barratta, by her trustee, had notified Salamone of her intention to improve her lot, and warned him to protect his wall.

In September, 1880, after having formally demanded of the trustee, Keiley, and the beneficiary, Mrs. Barratta, that they should rebuild his house or compensate him in damages, and their refusal or neglect to comply with the demand, Salamone filed his bill against them and Angelo Barratta in the chancery court of Richmond city, wherein he set forth substantially the aforesaid facts, and averred that the said trustee and *c'estui que*

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trust had, for the benefit of the trust property, undertaken to build thereon, and in so doing had deprived the plaintiff of his right to the adjacent and subjacent soil of their lot for the support of his lot and of his buildings thereon, and that his right to compensation in damages for said deprivation and his consequent loss was beyond all doubt, but that owing to the peculiar character or situation of the title of the lot on which the excavation was made, being trust property, in the hands of a trustee holding the naked legal title, while the entire beneficial interest therein and the control and management of the property are vested in a married woman, made it necessary to resort to a court of equity; that said lot was the only real estate held by said trustee for said married woman, the beneficiary, and that the claim asserted by the said Salamone, having been created in improving said lot, there resulted on it an equitable lien or charge for said claim, and prayed that the same be enforced in his favor.

The defendants answered denying that Salamone had any right of support for his said wall and house from the adjacent or subjacent soil of their lot, or that they did anything to accelerate the fall of his house, and asserting that the said wall of Salamone's house fell of its own infirmity, and that Salamone had been given timely notice of their intention to improve their lot, and warning him to protect himself.

At the hearing a decree was entered referring the cause to a master to inquire and report (1) whether the house had been injured by the said acts of the defendants, and if so, to what extent; and (2) whether the plaintiff was entitled for his house and lot to the support of the defendant's house and adjacent and subjacent soil.

The master having taken the depositions of numerous witnesses, reported (1) that the plaintiff was entitled to support for his land and the house thereon, from the adjacent and subjacent soil of the defendant's lot, but not from the adjacent house, as no such easement had been conveyed to him, or ac-

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quired by him by prescription; but that by reason of the contiguity of the buildings and lots, the defendants were under legal obligation to use due care and skill in removing their building so as not to injure that of the plaintiff, and that gross negligence had been committed by defendant's employes in making such removal and in making said excavation, whereby the fall of the plaintiff's building had resulted; and that his damage amounted to the sum of \$500.

On the coming in of the report Keiley, trustee, excepted thereto, but the court, on 19th January, 1882, overruled the exception and confirmed the report, and decreed that the plaintiff recover of the trustee the sum of \$500, with interest from the 30th of August, 1880, till paid, and his costs, and that the said real estate, held by him as such trustee, was liable therefor, and that unless the same be paid within a prescribed period, the said real estate be sold.

In the meantime Marable & Dansey, builders, who, under contract with Mrs. Barratta, made with the concurrence of her said trustee, had pulled down the house on the said western lot, and erected the new one thereon, filed their bill in the said chancery court against said trustee, and Angelo Barratta and Theresa, his wife, and said Salamone, to enforce on said building and lot their mechanic's lien thereon for the sum of \$3,260.18, and stated the pendency of the Salamone suit and the *lis pendens* which he had docketed against said western lot, and asserted the superiority of their lien over the claim of said Salamone, and prayed for relief accordingly. —

On the 21st of January, 1882, a decree was entered, by consent of parties, bringing the two causes on to be and they were then heard together, and giving liberty to the parties on either side to file such answers or cross-bills as they might have filed before the entry of said decree.

In June, 1882, the said chancery court did set aside said decree and dismiss with costs the said bill of C. C. Salamone, on

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the sole ground that “the bill did not disclose a case proper for the intervention of a court of equity.”

Before the rendition of the decree last aforesaid, the defendants, Keiley, trustee, and Barratta and wife, had answered the bill of Marable & Dansey, and set up, in partial defence against their claim, that they had done their work in such an unskillful, negligent, and unworkmanlike manner as to damage them, not only in preventing their raising money to pay off said mechanic's lien, but also in causing them to incur liability to C. C. Salamone for the destruction of his house, and asked to have any judgment or decree that might be entered in his suit against them set-off against the said claim of Marable & Dansey.

In July, 1882, in the said suit of Marable & Dansey, the court, by consent of all the parties except Salamone, decreed the sale of the said western lot, belonging to Mrs. Barratta, and directed the deposit of the proceeds of sale in the Citizens Bank of Richmond, to the credit of the said cause; and reciting the pendency of the suit of Salamone against Barratta and als., affecting said western lot, and the fact that an appeal from the decree therein dismissing the bill was contemplated, directed that \$1,000 of the said proceeds be retained to await the decision of the appeal and to satisfy any claim which may be established in favor of said Salamone, and that therefore the property should be sold free from any liability on account of said claim.

Cannon & Courtney, for the appellant.

A. M. Keiley and *Geo. P. Haw*, for the appellees.

RICHARDSON, J., delivered the opinion of the court.

Here we have the case of a married woman, the owner of separate estate—a lot on one of the principal streets in a populous city—who, in excavating on her property with the view of

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building thereon, did her work with such careless and reckless indifference to the rights of the owner of the adjoining lot as to cause the wall of the house thereon to fall, and finally to cause said house to become uninhabitable and useless. The person thus guilty of gross negligence, resulting in serious injury to the adjacent lot owner, being a married woman, is not amenable to an action at law. Nor is the case aided in this respect by the statute commonly known as the "married woman's act," passed April 4th, 1877, and amended by the act of March 14th, 1878, Acts 1876-'77, pages 333-4, and 1877-'78, pages 247-8, inasmuch as the separate estate here in question was acquired long prior to the passage of said act, which only makes the real and personal property of any female who shall *thereafter* marry, and which she shall own at the time of her marriage, and the rents, issues and profits thereof, and any property, real or personal, acquired by a married woman as a separate and sole trader (which may, in Virginia, be said to be an unknown quantity), her separate and sole property, with the power to contract in relation thereto, or for the disposal thereof, and not subject to her husband's disposal or liable for his debts; and confers upon her the right to sue, and makes her liable to be sued in respect of her contracts in relation thereto, &c., &c.; and in other respects said act only applies to real or personal estate *thereafter* acquired by a married woman, and therefore has no application to this case. In short, the act in question, except in the respect that it confers upon married women the right to sue, and makes them liable to be sued at law, or on contracts in relation to and for the disposal of her separate property, and on contracts made by her as a sole trader, confers no power and imposes no liability upon the persons embraced thereby, which did not attach to Mrs. Barratta independently thereof, or by virtue of the express terms of the settlement upon her.

The question, then, to which this court must respond, is,

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“Does the bill disclose a case proper for the intervention of a court of equity?”

In the consideration of this question, it is important to bear in mind that among the great objects for which government is instituted and laws promulgated must be reckoned the protection of the citizen in the lawful acquisition, use and enjoyment of property. While the ownership of property is intended to confer comfort, independence and happiness, there are, in every well-organized society, grave responsibilities incident to such ownership and use. No person having the absolute ownership and control of property can rightfully claim exemption from responsibility for such careless or willful misuse of his or her property as results in injury to others. All alike must answer in damages for the tortious use, as all are alike protected in the rightful enjoyment of property. If this be not so, then the boast of the law, that “there can be no right without a remedy,” is but hollow mockery.

Tested by these principles, how stands the case under consideration? By reason of the legal unity incident to the marriage relation, Mrs. Barratta, a married woman, cannot be sued at law. She is, in the eye of the common law, not a person *sui juris*, though, in equity, she will in respect to her separate estate be so treated: not that she can bind herself by contract, except as to her separate estate, any more than at law, but that she is in equity treated as a person *sui juris*, and may by her acts charge her separate estate, and thus the boast of the maxim above referred to may be vindicated.

Where the facts are, as the master's report in this case ascertains them to be, the right of the party thus injured to recover compensation in damages, by proper proceedings in the proper forum, is settled by the decision of this court in the case of *Stenson v. Wallace*, 27 Gratt. 77, which decision is certainly well-founded, in so far as it fixes liability in damages upon one who, in improving on his own property, is guilty of gross neg-

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ligence and want of skill, resulting in injury to the adjacent land owner.

In the case in hand, the defendants did not demur to the plaintiff's bill. The chancery court proceeded in the adjudication of the controversy raised by the bill and the answers thereto, by the aid of the inquiries made at its instance by its commissioner and duly reported, overruling the defendant's exception to the report which established the plaintiff's claim, not only to the compensation asked for on account of the injury done him in the destruction of his building, in consequence of the acts done by the trustee and the *cestui que trust* in their undertaking to improve the trust property, but also to subject that trust property to sale for the satisfaction of that claim. And then, as if upon an afterthought, on the filing of the petition for the rehearing and reversal of its decree, changed its view of the case *in toto*, concluded that all its proceedings theretofore had been without authority and were void, and dismissed the bill with costs to the defendants, upon the sole ground that though the facts were as alleged and the plaintiff had received injury in the manner and under the circumstances stated, yet a court of equity had no jurisdiction to afford him any relief in the premises.

Whilst it is settled, as was contended at bar by counsel for the appellee, that if a bill does not state a case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction by the defendant in his pleadings (see *Hudson v. Kline*, 9 Gratt. 379; *Berkley v. Palmer*, 11 Gratt. 625; *Green & Suttle v. Massie*, 21 Gratt. 356; 1 Barton's Chy. Pr. 252); on the other hand it is contended by counsel for the appellant that though on its face the bill may not state a case proper for equity jurisdiction, yet if the defendant has failed to demur, the court must, at the hearing, consider not only whether or not the bill alone makes such a case, but also whether or not the bill, aided by the answer and the proofs taken altogether, make such a case, and the

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decision of this court, in *Ambler v. Warwick & Co.*, 1 Leigh 196, certainly sustains this position. There the majority of the judges united in saying, in substance, that "if the bill do not present a case for the jurisdiction of the court, and other matters appear in the progress of the cause which supply the defect, the defendant, not having demurred to the bill, cannot object to the jurisdiction at the hearing, as, if the bill was for an account, without showing that the amounts were of such a character as to give jurisdiction, and that appeared from the answer or the proof." Other illustrations might be given—as where plaintiff avers that he sold and conveyed land to defendant, and has on it a lien for the unpaid purchase-money, which amounts to a given sum, and the defendant, declining to demur, answers and denies that the unpaid purchase-money amounts to the sum claimed in the bill, but only to, say, one-half of that sum; and at the hearing the conveyance is produced in evidence, and on its face shows a lien retained for a sum therein mentioned. The bill would have been demurrable for failing to state that the lien was reserved by the conveyance; but surely the pleadings and the proof, all taken together, would show a case fit for equity jurisdiction.

This view is countenanced by the case of *Green & Suttle v. Massie, supra*, where it was held that, "if at the hearing of a cause the case made upon *the pleadings and the proofs* is one of which a court of equity has no jurisdiction the bill should be dismissed," thus indicating that the court considered that, there being no demurrer, a defective bill may be supplemented by the answer and the evidence.

In the case at bar it is not pretended that the answer itself aided the bill, but that the suit of Marable & Dansey against the trustee, the beneficiary and her husband, and Salamone, for the purpose of enforcing the mechanic's lien for the unpaid price of the work done in making the very improvement of the trust property, in the making of which the injury to the adjacent property of the appellant arose, tends strongly in that

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direction. In their bill, Marable & Dansey set out Salamone's *lis pendens* for his claim against the trust property, and assert the superiority of their lien over it. In their answers, the trustee and the *cestui que trust* set up their claim to an equitable set-off against Marable & Dansey's lien, on account of the defective work and negligence, whereby their liability to Salamone arose. Certainly the chancery court had jurisdiction to hear and determine the case made by the bill of Marable & Dansey, and also the counter case made by the answers of the trustee and *cestui que trust*, and to pass upon the priorities between Marable & Dansey and Salamone, and therefore, incidentally, upon the claim of the latter, and to prevent circuitry and multiplicity of actions, and thus put an end to litigation.

Appreciating this ground of jurisdiction, said chancery court heard the two causes together; and even after rehearing and reversing the decree of 19th January, 1882, and dismissing Salamone's bill, directed \$1,000 of the proceeds of the sale of the trust property to be retained to meet the claim of Salamone in case of an ultimate decision in his favor. We incline to the opinion, in view of the character of the record of Marable & Dansey, heard together with this case, that the circumstances presented are entitled to much consideration as tending at least to show that at the hearing the pleadings and the proofs, taken together, did present a case proper for the jurisdiction of a court of equity. But we deem it unnecessary to decide this point, in view of the fact that upon full consideration of the main question, we are satisfied that the plaintiff's bill presents independently thereof a proper case for equitable jurisdiction and relief.

The grounds of such jurisdiction are two: First. The case involves the liability of a trustee, clothed with the legal title, and also of the trust subject for his acts as such trustee, done in managing and improving the trust property. Second. It also involves the liability of a married woman and her separate estate for her engagements, growing out of her undertaking to

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improve that separate estate. Both are sources of original equitable jurisdiction, and certainly none the less so when the same facts involve both of said grounds.

On the part of the appellees, the defendants below, it is contended that the claim of the appellant, the plaintiff below, is one of tort, and not of contract. Were it, as thus curtly stated, a claim founded on a mere willful tort, it might be true as contended, that the proper remedy would be by action at law. But that view is much too superficial, and falls far short of the real demands of the situation.

Just here a very brief summary of the facts will be useful. Here is one acting as trustee in conjunction with the *cestui que trust*, a married woman, in an undertaking to improve the trust property, her separate estate. In so acting, they take away the recognized legal right of an adjoining land owner to have the support of the adjacent and subjacent soil of the trust property, and in depriving him of which they do him an injury. When they undertook such improvement of their property, they impliedly engaged to answer for such liability as in such case the law imposes. It became then and there their legal duty to use proper care and skill; and by implication, they engaged to be responsible for the consequences of their want of care and skill. Whenever the law imposes on one undertaking certain acts a duty, such person engages, impliedly, to perform that duty or else be responsible in damages for default, if injury thereby results to another. The failure to perform that duty may be called a "tort," but it is certainly a tort growing out of the breach of the implied contract which the law raises in such a case, and such a tort as, in the usual phrase of legal proceeding, may be waived, and an action at law maintained, as for a breach of assumpsit. 1 Addison on Torts, 17-23; 2 Ib. 1101; 2 Rob. Pr. (new), 692-3; 3 Ib. 439-40; 4 Ib. 619-20.

In the case at bar it cannot be assumed that the injury done the plaintiff was a willful tort. A. M. Keiley was not person-

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ally liable. His act was as trustee, in managing and controlling the trust property, and the injury was the result of the failure of his employes to use the requisite care and skill, constituting a breach of his implied engagement to perform his duty as such trustee in the premises.

The fact that the *cestui que trust* had a husband, who might at common law have been suable for the injury to Salamone had it been a mere willful tort, unconnected with any express or implied agreement of the wife (see 1 Minor, 345), cannot alter her relations to the trust property, or impair the jurisdiction of equity to subject that property to liabilities created by the acts of herself and her trustee in their undertaking to improve it, since that jurisdiction arises, not from the absence alone of all jurisdiction at law, but from an original source. Yet it is true that the husband, Angelo Barratta, had no interest in or control over the trust property, and no participation in the scheme of improvement, as to all of which he was a mere cipher on the wrong side of the digit. And there can be, under the circumstances of this case, no sound reason of justice or law why he should be responsible, or why his possible responsibility, on merely technical rules, should oust a court of equity of its jurisdiction "to put the saddle on the right horse." See 4 Minor, 1202.

"Courts of equity," says an eminent English writer, "from their inherent jurisdiction, assumed from the beginning the exclusive control over trustees in the discharge of their duties, whether affecting real or personal estate." Hill on Trustees, page 42.

In *Huff v. Thrash*, 75 Va. 548, Burks, J., delivering the opinion of this court, quotes, with approbation, the remark of Marshall, Chief Justice, in *Fourle v. Laurason*, 5 Peters, 495, that "in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted." From all text-writers and adjudications on the subject it may be gathered that, over every

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case involving the liability of trustees as such and of trust estates, a court of equity has jurisdiction.

In *Zetelle v. Myers*, 19 Gratt. 62, Joynes, J., says: "It is a general rule that an action at law cannot be maintained against a trustee to recover money due from him in that character." Nor can such action be maintained against him as such trustee to answer for any liability incurred by him solely in that capacity.

But, for the appellees, it is contended that it does not follow that, in every case in which a trustee is a party, a court of equity has jurisdiction; and *Sheppards v. Turpin*, 3 Gratt. 357; *Armstrong v. Pitts*, 13 Gratt. 235; and *Markham v. Guerrant & Watkins*, 4 Leigh, 279, are cited as authorities for the position. If it be only meant that where the trustee is improperly made a party, the mere act of making him such cannot afford grounds for equity jurisdiction, the position is undeniable, and is sustained by those cases. But in those cases it was expressly decided that the trustee was not a proper party; in other words, that the bills made no case against him.

In *Sheppards v. Turpin*, *supra*, Turpin held property under a trust-deed. The Sheppards claimed that property against the trust-deed, and were in possession. The trust was not involved in that litigation. Turpin's remedy was at law.

In *Armstrong v. Pitts*, *supra*, a farm and slaves had been devised to trustees for the support of Joseph N. Armstrong and family during his life, with remainder over, with an express declaration that the property should in no way be liable for any of his then or subsequent debts or liabilities. He contracted debts for goods and medical services for his family. His creditors filed their bill against him and his wife, and the trustees, who had in no way contracted the debts. The court held, on the authority of *Markham v. Guerrant & Watkins*, *supra* (a very similar case), that no contract with the *cestui que trust*, in such a case, would give his creditors a lien on the trust subject and

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a right to come into equity to subject it to the payment of their claims. The case is quite dissimilar to the case at bar, in which the acts of the trustee, in improving the trust property, created the liability on the trust property, and thereby involved it in a controversy properly cognizable in a court of equity.

As to the second ground of jurisdiction, it will be borne in mind that Mrs. Barratta, the *cestui que trust*, was a married woman, possessed of a separate estate with the unrestricted *jus disponendi*, with the power incident thereto of charging that estate with the payment of her liabilities, whether created by her express or by her implied engagements. And here a quotation from the case of *Armstrong v. Pitts*, *supra*, referred to and relied on by counsel for the appellees, seems appropriate. Moncure J., in delivering the opinion in that case, on page 240, says: "The claim of the creditor against his debtor is generally *in personam* only. He can acquire a lien upon specific property only in some mode prescribed by law, or under some contract made for the purpose, or some trust created for his benefit. If his debtor be a *feme covert*, entitled to a separate estate, he can have no claim against her personally, because she is incapable in law of making a contract to bind herself personally, and can only bind her separate estate, as to which she is regarded in equity as a *feme sole*. All the contracts which she is authorized to make, under the settlement on her, are considered as made in reference to, and as binding upon, her separate estate. Her creditors, therefore, cannot sue her at law, but must go into equity in pursuit of that estate. But if the debtor be *sui juris*, the creditor cannot go to equity merely because a trust has been created for the benefit of the debtor." And in *Walters v. Farmers Bank of Virginia*, 76 Va. 15, Staples J., in pronouncing the opinion of the court, said: "No judgment *in personam* can be rendered against a married woman for liabilities incurred during the coverture, and, there-

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fore, a chancery court is the appropriate tribunal for the enforcement of the remedy against her."

The adjudications of this court upon the powers and liabilities of married women as to their separate estates are numerous and too familiar to require citation or comment. Some of them are cited in the opinion of Burks J. in *Bain & Bro. v. Buff's adm'r*, 76 Va. 371. The doctrine taught by them, so far as applicable to this case, is that, when a married woman possesses a separate estate of which she has the *jus disponendi*, and expressly or impliedly creates a liability, she is taken to have charged that estate with the satisfaction thereof, and the appropriate tribunal for the remedy is a court of equity.

For the appellees it has been strenuously urged that Mrs. Barratta made no engagement to answer for any liability to Salamone which she might incur in her undertaking to improve her lot. Expressly she did not, though she did notify him of her determination to improve her lot. But when she embarked on that enterprise, she impliedly engaged to do the duty which the law imposed on her in such a case, namely—to use due care and skill, and to answer for all liability resulting from her default. Had she been *sui juris*, there could have been no question as to the implied engagement, and her liability for the injury to Salamone's property, and her amenability therefor at law. In equity, however, *quoad* her separate estate, she is *sui juris*. By her default in not using due care and skill in improving her separate estate, she impliedly charged that estate with her liability, and that estate may be pursued in equity for the satisfaction of that liability.

We are, therefore, of opinion that the decree of the chancery court of the city of Richmond, dismissing the bill of the appellant, is erroneous, and must be reversed and annulled, with costs to the appellant, and a decree entered here providing for the payment to the appellant of the sum of \$500, the amount of his damage as ascertained by the commissioner in his report, with interest thereon from the 30th of August, 1880, until paid,

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out of the \$1,000, part of the proceeds of sale of the trust property, which was directed by the decree of the court below, in the case of Marable & Dansey, to be retained to satisfy this claim in the event of an ultimate decision in favor of Salamone.

HINTON J., dissented.

DECREE REVERSED.

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BATCHELDER AND ALS. v. WHITE.

JANUARY 15th, 1885.

1. PRACTICE IN CHANCERY—*Multifariousness*.—Bill in equity against a number of distinct alienees of separate parcels of land, to set aside the several alienations as fraudulent and void, is not multifarious, though there be no charge of confederacy. The several defendants have one common interest centering in the point in issue, which is the alleged fraud in the disposition of the debtor's property. *Almond v. Wilson*, 75 Va. 643. *Hill v. Hill*, 79 Va. 592.
2. IDEM—*Foreign attachment—Bill demurrable—When*.—Neither under section 2, chapter 175, nor under section 11, chapter 148, Code 1873, can "a suit, in the nature of a foreign attachment," be maintained unless the claim asserted be actually due. Unless the bill avers that a debt is due the plaintiff from one who is non-resident of this State, and who has estate and effects in this State, it is demurrable. *Cirode v. Buchanan*, 22 Gratt. 216
3. ALTERATION OF INSTRUMENT—*Case at bar*.—A material alteration of a bond or note after its execution, when intentionally made by one having an interest in it, and without the consent of the party bound by it, invalidates the instrument as to such party. *Dobyns v. Rawley*, 76 Va. 544.

Q. borrowed of W. \$1,000, upon his note endorsed by S. Afterwards, without the consent or knowledge of S., but with the knowledge and consent of W., the note was altered by Q., and raised to \$1,500, as security for an additional \$500, which thereupon W. lent Q.

HELD:

The alteration invalidated the note entirely as to S.

4. FRAUDULENT CONVEYANCES—*Innocent purchaser*.—It is not enough that the purpose of the grantor be fraudulent. Knowledge of such purpose must be clearly brought home to the alienee. Where the latter has denied such knowledge on oath, it cannot be held that his denial is overthrown by mere circumstances of suspicion adduced against him.

Appeal from decree of corporation court of Norfolk city, entered 21st October, 1882, in a certain suit in equity wherein Elizabeth White was plaintiff, and the appellants, B. F. Batchelder and J. R. Spruill, E. M. Quimby, and two others, were defendants.

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Edgar Allan and Ed. Spalding, for the appellants.

Burroughs & Bro. and Godwin & Martin, for the appellees.

HINTON, J., delivered the opinion of the court.

This suit was instituted by the plaintiff, Elizabeth White, to recover the sum of \$3,000, claimed to have been loaned by her to E. M. Quimby, one of the defendants, and to have three certain deeds of conveyance made by said Quimby to different parties, each conveying different property, and executed at different times, set aside and declared void as to the creditors of said Quimby, and the property thereby conveyed subjected to the payment of said Quimby's debts; and also to recover from J. R. Spruill, as endorser of a note for \$1,000, made by said Quimby to the plaintiff, that amount on account of said endorsement, it being parcel of the sum above mentioned.

It appears by the record that Quimby executed a note for \$1,000, which was dated May 9th, 1880, endorsed by the said Spruill, made payable to the order of the plaintiff, and delivered by Quimby to the plaintiff, on which, at the time of the delivery, she loaned Quimby \$1,000. Afterwards, and while this note was in the plaintiff's ownership and possession, Quimby, with the knowledge and consent of the plaintiff, but without the knowledge of Spruill, so changed the note as to make it express on its face that it was for the sum of \$1,500; and, upon the strength of this alteration, Quimby received from the plaintiff the further sum of \$500.

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Subsequently, another note for the sum of \$1,500, dated August 9th, 1880, was executed and delivered by Quimby to the plaintiff. Each of these notes was payable, by its terms, one year after date.

The first of these notes was destroyed or carried away by Quimby, who left the State on the 26th August, 1880; and a few days thereafter, and before the notes were due, this suit was instituted, and an attachment was sued out and levied on certain property conveyed by the deed from Quimby to B. F. Batchelder, one of the appellants. There was a demurrer to the bill; answers by all of the defendants denying the charge of fraud; and a motion to dismiss the attachment.

The court, however, overruled the demurrer, refused to dissolve the attachment, dismissed the bill as to all of the defendants except as to B. F. Batchelder and Spruill, and decreed that the conveyance from Quimby to B. F. Batchelder was fraudulent and void, and that the property thereby conveyed was liable for Quimby's debts, and that Spruill was liable to the extent of \$1,000, the amount of the note endorsed by him.

The bill was not multifarious; for, as was said by this court in *Almond v. Wilson*, 75 Va. 623, it is common practice for a judgment creditor to unite in one bill any number of purchasers claiming different parcels of land by separate and distinct alienations. When the bill is against fraudulent alienees, the matter in litigation is the fraud charged in the management and disposition of the debtor's property, in which charge all of the defendants are interested, though in different degrees and proportions. In such a case, and the case at bar is of that character, the uniting of the alienees in the same suit imposes no hardship on them worthy of consideration in comparison with that which will be imposed upon the creditors if a different rule is adopted, and they are forced to pursue in a separate suit each person to whom the debtor may have conveyed any portion of his property in pursuance of his purpose to defraud his creditors. As to the alienees then, we think that, as

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a general rule, where they are charged with being parties to a fraudulent transaction, they can have no just cause of complaint if they are united in one suit. And when, as in the case before us, a surety is also made a defendant, we think that he also is without cause of complaint, because he is interested in having all of the property which has been fraudulently alienated recovered and applied in exoneration of any liability he may have incurred by reason of his suretyship. *Hill v. Hill*, 79 Va. 592; *Bump on Fraudulent Conveyances* (3d ed.), page 551. The bill was not demurrable, therefore, on this ground.

But, as we have stated, the notes, in one of which an alteration had been made, were not due at the time of the institution of the suit. The question, therefore, arises whether such a claim constitutes a proper foundation for a suit. The suit here was doubtless designed to be what Moncure P., in *Cirole v. Buchanan*, 22 Gratt. 218, styled the suit in that case, a suit in the nature of a foreign attachment. And it is insisted that such a suit, upon such a claim, may be maintained—first, under section 2 of chapter 175 of the Code of 1873; and second, under section 11 of the attachment laws (section 11, chapter 148, Virginia Code, 1873). The statute first invoked by the appellee provides that “a creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, transfer, or any charge upon the estate of his debtor which he might institute after obtaining such judgment or decree, and that he may, in such suit, have all the relief in respect to such estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover.” This statute came under review in *Wallace v. Treacle*, 27 Gratt. 487. But there is nothing in the opinion of the court in that case, or in the terms of the statute, which gives the slightest countenance to the position assumed by the appellee. Equally little weight is to be attached to the suggestion that the suit may be maintained under section 11 of chapter 148 of the Code. In *O'Brien v. Stephens*,

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11 Gratt. 611, Samuels J., in commenting upon the amendment which was engrafted upon this section, as it stood in the Code of 1849, by the act of April 3d, 1852, Session Acts 1852, chapter 95, section 1, said: "The statute of 1852, * * taken in connection with the statute, Code 1849, chapter 151, section 1, gives a creditor the right, upon making an affidavit stating the amount and justice of the claim, that there is a present cause of action therefor, that the defendant, or one of the defendants, is not a resident of this state, and that the affiant believes he has estate or debts due him within the county or corporation in which the suit is, or that he is sued with a defendant residing therein, to sue out of the clerk's office an attachment against the estate of the non-resident for the amount so stated." Thus clearly evidencing that, in the opinion of the judge (although the opinion so expressed was *obiter*), the claim against the non-resident must be due, or that no suit could be brought thereon. In this opinion we concur. Daniel on Attach., sections 37, 38; 1 Bart. Chy. Pr., 574-582. *Cirode v. Buchanan*, 22 Gratt. 211. It being then a prerequisite to the maintenance of the suit that the claim asserted shall be due, and it being patent on the face of the bill that the debt here sought to be enforced was *not* due, the bill was clearly demurrable, and should have been dismissed. It is not necessary, however, to rest the case, so far as the appellants, Spruill and Batchelder, are concerned, entirely upon the foregoing ground. For Spruill was discharged from all liability for the note for \$1,000, the only one upon which he was endorser, by reason of the alteration made in the body thereof, as the authorities are abundant to establish.

In *Newell v. Mayberry*, 3 Leigh, 254, Tucker, P., speaking for the court, said: "If it had appeared that the alteration was made by Mayberry, or any other, by his procurement, then he could never recover upon this contract, nor could he be permitted to establish it by any other evidence, or to avail himself of the contract, according to its original or true character."

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In another case, Burks, J., delivering the opinion of the court, said: "A material alteration of a bond or note after its execution, when intentionally made by one having an interest in it, and without the consent of the party bound by it, invalidates the instrument as to such party." This is the general rule to be deduced from the authorities at this day, and the chief reason of the rule is said to be that the "alteration destroys the identity of the contract; and therefore, if a party to the contract who has not consented to the alteration were to be held bound by it, it would be, in effect, imposing upon him, against his will, a new contract, to whose terms he never agreed. Note to *Woodworth v. Bank of America*, 10 Amer. Decisions, 267, and cases there cited." *Neff v. Homer*, 63 Penn. St. 330; *Chadwick v. Eastman*, 53 Me. 12; *Wood v. Steele*, 6 Wall. 80, and *Angle v. N. W. Mut. Ins. Co.*, 2 Otto, 342, where Mr. Justice Clifford says: "Authorities to show that a material alteration of a written instrument renders it void are unnecessary, as it is a principle of universal application." And the doctrine applies *a fortiori* in favor of a surety. 2 Pars. on B. & N. 561-562. Here the alteration was material, for it increased the debt by one-half of the original amount. It was made, if not by the procurement of the plaintiff, at least in her presence and with her permission. And she has actually sought to enforce the collection, not simply of the amount of her original demand, but of the amount by which the note was increased as well. She must suffer the consequences of her own folly and misplaced confidence, for the rule is not only wise but eminently just which requires that, if one of two innocent persons must suffer by the misconduct of a third person, that party shall suffer who, by his own act and conduct, has enabled such third person, by giving him credit, to practice a fraud or imposition upon the other party. Story on Agency, sections 56, 264; *Goodman v. Eastman*, 4 N. H. 461; *Wood v. Steele*, 6 Wall. 82; *Miller v. Gibson*, 19 Penn. St. R. 123.

Now, as to the defendant, B. F. Batchelder. It must be con-

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ceded—for looking at the facts of this case in the light of subsequent events no other conclusion can be reached—that Quimby disposed of all of his property in pursuance of an actual intent to defraud his creditors. But it by no means follows that Batchelder was cognizant of this purpose. He has filed an answer, strictly responsive to the bill, in which he denies, in the most positive and emphatic manner, all knowledge of or participation in such fraudulent purpose, and this answer must be taken as true, unless overthrown by the satisfactory testimony of at least two opposing witnesses, or of one such witness with clear, corroborating circumstances. 1 Daniel Chy. Prac. 843; *Fant v. Miller & Mayhew*, 17 Gratt. 187; *Shurtz v. Johnson*, 28 Gratt. 664. Now, taking the responsive statements of the answer as true, it is impossible that we should hold that they are overthrown by the mere circumstances of suspicion adduced against them. Batchelder, we must remember, had not the advantages now possessed by the court for reading the purpose and intent of Quimby in disposing of his property. He held out to Batchelder, as he did to others, an intention to change his business as the reason for his selling out, and Batchelder, who could see that he was disposing of his goods, may well have been deluded into the belief that his transactions were fair. Under the pleadings and proofs in the cause, there is no case made against Batchelder.

We are of opinion to reverse the decree of the corporation court of Norfolk, abate the attachment, and to dismiss the bill, without prejudice to any right which the appellees may have to hereafter sue Quimby or his personal representatives.

• DECREE REVERSED.

Richmond.

CENTRAL LUNATIC ASYLUM v. FLANAGAN.

JANUARY 15th, 1885.

1. PRACTICE AT COMMON LAW—*Bill of particulars*.—In action for damages, defendant's motion that plaintiff be required to file bill of particulars, is then denied, but at next term it is allowed, and plaintiff files the bill, and trial proceeds, without defendants asking for time to consider of his defence, he cannot raise the objection in the appellate court.
2. CONSTRUCTION OF STATUTE—*Perfected contract*.—Under acts approved 6th March, 1882 (Acts 1881-'82, pages 246-249), authorizing the directors of the Central Lunatic Asylum to contract for the erection of suitable buildings for the accommodation of the colored insane of this State, no written and signed contract was required; and upon the acceptance by the board of the contractor's bonds, and the spreading upon the minutes of the articles of agreement between the parties, a contract was consummated, for any breach whereof the party aggrieved was entitled to recover damages. And if the bonds taken *from* the contractor were of the required penalty and conditions, and with sufficient security, it was immaterial whether they were executed *by* the contractor or by others.
3. PRACTICE AT COMMON LAW—*Instructions*.—It was not error in the court to instruct the jury in such action that, after the board's accepting the plaintiff's bond and furnishing him with a written contract, and after his executing it and delivering it to the president of the board, the president's failure to execute it could not deprive the plaintiff of any right under the contract; and that if thereafter, without any fault on plaintiff's part, the defendant board prohibited or prevented him from fulfilling the contract, they should find for the plaintiff for the labor done, the money expended, the materials furnished, and the profits he would have realized in the performance of the contract, had he been permitted to fulfill it. *Com'rs Sinking Fund v. Kendall Bank-Note Co.*, 79 Va.
4. *IDEM*—*Instructions*.—When instructions given cover the entire case and

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properly submit it to the jury, it is not error to refuse to give others. *Laber v. Cooper*, 7 Wall. 565. It is safest, however, for the court to give instructions asked for when they correctly propound the law and are relevant to any evidence in the case. *Hopkins v. Richardson*, 9 Gratt. 485.

Error to judgment of circuit court of Richmond city, rendered 19th January, 1884, in an action of assumpsit, wherein Madison Flanagan was plaintiff, and the board of directors of the Central Lunatic Asylum were defendants. The object of the suit was to recover damages for the breach of a certain contract. The jury found for the plaintiff, and assessed his damages at \$6,159.50. During the trial the defendant excepted to sundry rulings of the court, and after the rendition of the verdict moved to set it aside as being contrary to the law and the evidence; but the motion was overruled, and the court entered judgment according to the verdict. To which judgment the defendant board obtained, from one of the judges of this court, a writ of error and *supersedeas*.

Opinion states the case.

Attorney-General F. S. Blair, for the plaintiff in error.

W. M. Flanagan, *W. W. Cosby*, and *Edgar Allan*, for the defendant in error.

LEWIS, P., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of the city of Richmond. The facts of this case are few, and the principles of law applicable thereto well settled. Pursuant to an act of the legislature, approved March 6th, 1882, and amended and reenacted the same day (Acts 1881-'82, p. 246, *et seq.*), the plaintiffs in error, on the 22d day of August, 1882, directed the president of the board to make proper advertisement for bids for the erection of a new asylum building. Advertisement was duly made, and at a subsequent meeting of the

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board, when the bids were opened, the bid of the defendant in error, for the proposed brick and carpenter work, was accepted. The price bid and accepted was: For the brick work, \$24,995.50; and for the carpenter's work, \$24,480.50. By the provisions of the act aforesaid, the directors were required to take bonds, with sufficient security, from the person or persons contracting for the work, in the penal sum of \$20,000. With this requirement the parties complied, the defendant in error executing bond with sureties in that sum, upon being informed of the acceptance of his bid by the board. Afterwards, to-wit, on the 23d day of October, 1882, the defendant in error was informed by letter, from the chairman of the building committee, that he was desired by the committee to furnish "more responsible bondsmen" within the next ten days. To this letter he replied as follows: "Without waiving any right I now have in the premises, I would offer you, in response to your request, the enclosed bond, on which are the names of J. C. Wool and Edgar Allan." This bond was in a penalty of \$13,000, and, like the first bond, was with condition for the faithful performance of the work for which the bids of Flanagan, the defendant in error, had been accepted. This bond, along with the first bond, was approved and accepted by formal resolution of the board of directors, at a meeting held on the 30th of the same month. And at the same meeting articles of agreement between the board on the one hand and Flanagan on the other, with specifications attached, were spread at large on the minutes of the board. Copies of these articles were ordered to be made for the signatures of the president and Flanagan. The latter signed the copy presented to him, which was thereupon forwarded by the secretary to the president, to be also signed by him. But, being called from the State at the time, he did not sign it, though he testified that he would have done so if he had received the paper before his departure from the State.

The articles of agreement and specifications contained in full the terms of the contract between the parties, and it appears

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from Flanagan's testimony that, after the adjournment of the meeting of the board, at which his bonds had been accepted and approved, and on the same day, he was instructed by various members of the board "to push ahead with the work," which he soon thereafter proceeded to do. It appears, from the minutes of the board, that at a meeting, the day after the acceptance of the bonds of the contractor, a resolution to reconsider the action by which the bonds had been accepted was rejected, and of this action, it seems, Flanagan was promptly informed. Afterwards, however, at a meeting of the board, on the 13th December, its previous action in respect to the acceptance of the bonds was, on motion, set aside and annulled; and, thereupon, it was resolved "that Madison Flanagan be allowed until the 10th day of January, 1883, to give a new bond as contractor in the sum of \$12,000, to be approved by the building committee and the board," etc. After being informed of this action, a bond in the required penalty of \$12,000, signed by C. H. Harman and W. W. Flanagan, was furnished by Flanagan, the condition being to make good any liability that might thereafter "be adjudged against the said Madison Flanagan and his sureties" on the former bonds, to the extent of twelve thousand dollars. In a letter to the board, transmitting this bond, under date of January 1, 1883, and referring to its resolution requiring it, Flanagan said: "Permit me to say that I do not concede your right to annex the last requirement as to a bond, and against it I respectfully enter my protest, maintaining and holding, as I do, that our mutual promises and agreements are now binding upon both of us. * * * With the addition of these names (on the bond now furnished), I am prepared to show that I have given security upon a penalty of \$12,000, which is far in excess of \$100,000, and I would submit that your repeated demands might have operated harshly, but for my ready ability to go far beyond my present showing as to endorsers. I have not understood your last request as a direction to suspend work, and have continued to prosecute the

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same as fast as the weather would permit, and have completed the frames for the cellar."

But it would seem that the board was not yet satisfied; and, accordingly, at a meeting held on the 19th January, it was resolved that Madison Flanagan be dismissed from the work, and that advertisement be made for new bids. It is true there was oral testimony that the resolution was erroneously entered by the secretary. For the board it was contended that this action was in consequence of the failure of Flanagan to furnish bond and security according to the requirements of the board. But, in the view we take of the case, the result is the same.

In consequence of this termination of the relations between the parties the present suit was brought, in which the plaintiff claims damages to the amount of \$25,000. The case was fully heard, and resulted in a verdict and judgment for the plaintiff for \$6,159.50.

At the trial the defendants asked for thirteen instructions, all of which were refused, and in the petition to this court there are no less than sixteen errors assigned, with an intimation of "other errors to be assigned at bar."

It is wholly unnecessary to consider these various assignments in detail. The general principles applicable to them all will be stated, and by which the judgment must be controlled.

It is insisted, first, that the circuit court erred in refusing to require the plaintiff, on the defendant's motion, to file a bill of particulars. It appears that the motion was denied at the term at which it was made, but at the next term, and before trial, the plaintiff appeared and filed a bill, in which the items of his claim were fully and clearly set out. Thereupon, if the defendants desired time for the preparation of their defence, an application to the circuit court for a postponement of the trial ought to have been made. And as no such application was there made, the objection now raised here cannot avail.

There can be no reasonable doubt that, upon the acceptance of the plaintiff's bonds, and the spreading upon the minutes of

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the board the articles of agreement between the parties, a contract was consummated, for the breach of which the plaintiff was entitled to recover damages. The statute required bond in a certain penalty, with sufficient security, to be taken from the contractor; but did not require that a contract between the parties should be reduced to writing and signed. The terms of the contract had been agreed upon when the articles were signed by the plaintiff, and there was nothing further for him to do but to proceed with the prosecution of the work he had undertaken. The testimony shows that the first bond was probably "sufficient security;" but if there was any doubt as to the sufficiency of the security, the second bond, which was afterwards furnished, and which was formally approved by the board, afforded a security which would seem to have been ample. At all events there is no testimony whatever in the record to the contrary. And in respect to the last (or third) bond, the proof is overwhelming that the signers were men of means far more than sufficient to easily discharge the amount of the penalty in which the bond was executed. The objection urged by the Attorney-General to the validity of the second and third bonds, because neither was in the penalty of \$20,000, and the last was not executed by the contractor, is not well founded. The object of the statute under which the parties were proceeding was to require, as its terms import, a bond in a penalty of \$20,000, with security, to be taken; but there is no requirement that the bond shall be executed by the contractor himself. The interests of the State are protected if the security is sufficient, whether the bond is executed by the contractor or not; and therefore the language of the act is that bond shall be taken *from* the contractor, which does not necessarily imply that it shall be *executed by* the contractor.

In the present case the first bond was signed by the contractor, and was in a penalty of \$20,000, as required by the statute, and the second and third were intended simply to strengthen the security of that bond. And that they were valid

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obligations for that purpose, in view of the general powers of the board to contract, etc., there can be no doubt. Code 1873, page 715.

The requirements of the statute in respect to taking bond were, therefore, fully complied with, and the court properly instructed the jury as follows: "If the jury believe that, after the action of the board of the asylum of October 30th and October 31st, 1882, in accepting the bonds of the plaintiff and in prescribing the form of contract, the plaintiff was furnished with a written contract in such form, and that he executed it by his own signature and delivery to the president of the board, then it became the duty of the president to execute it on behalf of the board, and his failure to do so could not deprive the plaintiff of any rights under the contract, and if thereafter, without any fault on the part of the plaintiff, the defendants prohibited or prevented him from fulfilling the contract, they should find for the plaintiff."

Nor did the court err in instructing the jury that if they believed, from the evidence, that the plaintiff was entitled to recover, they should allow a reasonable sum for work and labor done, money expended in the performance of the contract, and materials furnished, and, in addition, an equivalent sum for *the profits which he would have realized* from the performance of the contract if he had been permitted to execute it. This was entirely right. The subject has been recently considered by this court, in the case of *The Commissioners of the Sinking Fund v. The Kendall Bank-Note Company*, 79 Va., 563, in which, after a review of the authorities by Judge Lacy, who delivered the opinion, the law was declared to be as stated to the jury by the circuit court.

By these instructions the law of the case was fully and correctly propounded to the jury, and, upon the evidence, we are of opinion that the verdict is right and ought not to be disturbed. It is well settled that when instructions are given which cover the entire case, and which properly submit the

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case to the jury, it is not error to refuse to give others, even though in point of law they are correct. *Laber v. Cooper*, 7 Wall. 565. It is safest, however, for the court to give instructions asked for when they correctly propound the law and are relevant to any evidence in the case. *Hopkins v. Richardson*, 9 Gratt. 485; 4 Minor's Insts. Pt. I, page 747, and cases cited.

What has been said sufficiently disposes of the several assignments of error in the petition, and requires an affirmance of the judgment of the circuit court.

JUDGMENT AFFIRMED.

Richmond.**BROWN, DAVIS & Co. v. GREENHOW, TREASURER.**

JANUARY 29th, 1885.

1. PRACTICE AT COMMON LAW—*Coupons—Tax-payers' remedy—Assumpsit.*—Assumpsit against collecting officer is the proper remedy of a tax-payer to recover money paid by him for taxes, after collector's refusal to accept coupons tendered in payment thereof, under act approved January 26th, 1882. Acts 1881-'82, page 37.
2. IDEM—*Pleading—Special counts—Common counts.*—In the declaration to special counts alleging the tender of tax-receivable coupons to pay the tax, and the defendant's refusal to accept the coupons, and the latter's proceeding to collect the tax in money, when payment thereof was made under protest, the common counts for money had and received, &c., may be added.
3. IDEM—*Judgment against State.*—The action under this statute is in form against the collector; but being to recover a demand growing out of his acts done *colore officii*, is substantially against the Commonwealth, and the judgment is likewise.

Error to judgment of circuit court of Richmond city, rendered 26th December, 1883, in an action of assumpsit, wherein Brown, Davis & Co. were plaintiffs, and Samuel C. Greenhow, treasurer of the city of Richmond, was defendant.

The plaintiffs being assessed with \$600, license-tax for 1883, tendered past-due tax-receivable coupons, cut from bonds issued by the State, in payment thereof. The said treasurer refused to receive them, and proceeded to collect the tax in money. Then the plaintiffs paid the tax in money, under protest, and in pursuance of the act of 26th January, 1882, brought his action to recover the money so paid. The defendant demurred

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to the declaration. The circuit court sustained the demurrer. To the judgment the plaintiffs obtained a writ of error.

Christian & Christian, for the plaintiff in error.

Attorney-General F. S. Blair, for the defendant in error.

LEWIS, P., delivered the opinion of the court.

By an act approved January 26th, 1882, entitled "an act to provide for the more efficient collection of the revenue to support government, maintain the public schools, and to pay interest on the public debt," and which took effect on the 1st day of December of that year, it is enacted as follows: Section 1. "That the several tax collectors of this Commonwealth shall receive, in discharge of the taxes, license taxes, and other dues, gold, silver, United States treasury notes, national bank currency, and nothing else: provided that in all cases in which an officer charged by law with the collection of revenue due the State shall take any steps for the collection of the same, claimed to be due from any citizen or tax-payer, such person against whom such step is taken, if he conceives the same to be unjust or illegal, or against any statute, or to be unconstitutional, may pay the same under protest, and under such payment the officer collecting the same shall pay such revenue into the State treasury, giving notice at the time of such payment to the treasurer that the same was paid under protest. The person so paying such revenue may at any time within thirty days after making such payment, and not longer thereafter, sue the said officer so collecting such revenue in the court having jurisdiction of the parties and amounts. If it be determined that the same was wrongfully collected, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded; and thereupon, the Auditor of Public Accounts shall

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issue his proper warrant for the same, which shall be paid in preference to other claims on the treasury, except such as have priority by constitutional requirement. * * * In all such cases, if the court certify of record that the officer defendant acted in good faith and diligently defended the action, the necessary costs incurred by him shall be taxed to and paid by the State, as in criminal cases." Acts 1881-'82, p. 37, *et seq.*

The plaintiffs in error were merchants doing business in this city, and as such, were duly assessed with a license tax for the year 1883, amounting to the sum of \$600. The declaration avers that, in payment of this tax, they tendered to the defendant in error, the treasurer of the city of Richmond, the officer charged by law with its collection, certain genuine past-due tax-receivable coupons, cut from the genuine bonds of the State, and receivable for taxes due the State, amounting to the sum of \$600. The declaration then proceeds as follows: "And the plaintiffs aver that from thence hitherto they have been, and still are, ready to pay to the said defendant, or to any other person authorized by law to receive the same, the said \$600 in coupons in full of said taxes, and they now bring the same into court, here ready to be paid to said defendant, or to any one authorized by law to receive the same for the State. But the plaintiffs aver that the said defendant, then and there, and has at all times since, refused to receive said \$600 in coupons tendered by them, as aforesaid, for said taxes, and then and there demanded payment of the same in money alone, viz.: in gold, silver, United States treasury notes, or national bank notes; and upon said plaintiffs' refusing to pay in money alone, as demanded by the said defendant, he, the said defendant, then and there proceeded to take steps against the plaintiffs for the collection of said taxes in gold, &c. Whereupon, and within thirty days, before the commencement of this action, the said plaintiffs paid to the said defendant, under protest, the amount of said taxes in money alone, viz.: \$600 in gold, silver, United States treasury notes, and national bank notes, as re-

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quired by the said defendant, and reserved the right to recover the said amount so paid under protest," etc. In addition to the first or special count, the declaration also contains the common counts in assumpsit in the usual form. The defendant demurred, and the circuit court overruled the demurrer as to the common counts, but sustained the same "as to the whole declaration, and to the first count thereof." And the plaintiffs not asking to amend the declaration, it was "considered by the court that the plaintiffs take nothing by their bill, and that the defendant go thereof without day," etc. To this judgment, which was pronounced on the 26th December, 1883, a writ of error was awarded by one of the judges of this court.

The tax assessed against the plaintiffs being a license tax, the treasurer was authorized by law to distrain for the same as soon as the assessor's list was placed in his hands for collection. In this respect the case is unlike the attempted collection of the general property-tax, which the various collecting officers are not authorized to take steps to collect before the first day of December in any year. This being so, the special count alleges the tender of tax-receivable coupons in payment of the tax due by the plaintiffs, the refusal of the defendant to receive the coupons, and that the latter thereupon proceeded to take steps to collect the tax in money, when payment thereof was made under protest. It also brings into court the identical coupons rejected by the officer, "ready to be paid to the defendant, or to any one authorized by law to receive the same for the State;" and, in short, it sets forth all the facts, the existence of which, under the statute, is essential to the plaintiffs' right to recover.

The statute does not prescribe the nature of the suit to be brought by the dissatisfied tax-payer, but it is evident that *an action* of some sort was contemplated by the legislature. Thus, the act provides that where *judgment* is rendered for the defendant, costs shall be taxed, etc.; and provision is also made for the payment by the State of the defendant's necessary costs,

when the court certifies that he has "acted in good faith and diligently defended *the action*," etc. It is plain, therefore, that a common law action was contemplated, and it is equally plain that an action of *assumpsit* for money had and received against the officer, whose conduct is conceived to be wrongful, is the appropriate remedy. (By an amendatory act, passed since the present case was brought to this court, the suit is now required to be commenced by a *petition* filed at rules. Acts 1883-'84, p. 527.) It has long been settled that *assumpsit* will lie to recover money illegally exacted as and for duties or taxes, where paid under protest, or with notice of an intention to contest the claim, unless expressly or impliedly prohibited by statute. *Elliott v. Swartwout*, 10 Pet. 137; *Bend v. Hoyt*, 13 Id. 263; *Cary v. Curtis*, 3 How. 236; *City of Philadelphia v. The Collector*, 5 Wall. 720. It will lie in general whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund; 2 Rob. Pr. (new ed.), 449, 473. It is true that the collecting officer is required to pay into the treasury all money collected by him, giving notice of the fact when any part of it is paid by the tax-payer under protest, and consequently it cannot be said, in a case like the present, that there is in the defendant's hands any money of the plaintiffs which *ex equo et bono* he ought to refund. But the suit contemplated by the statute, although nominally against the officer, is virtually against the State itself; and hence it is provided that, if it be determined that the money sought to be recovered was wrongfully collected and ought to be refunded, and the court trying the case shall so certify, the Auditor shall forthwith issue his warrant for the same, which shall be paid in preference to other claims on the treasury, except such as have priority by constitutional requirement. It is plain, therefore, that a personal judgment against the officer is not contemplated by the statute, but that circumstance cannot affect the right to maintain an action, however great a departure from the ordinary

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practice such a form of procedure may be. It is a sufficient answer to the objections which were sustained by the circuit court, that the form of proceeding suggested by the counsel for plaintiffs is sanctioned by the legislature, whose power in respect to such matters is supreme.

It is next insisted that inasmuch as the defendant, in rejecting the coupons tendered by the plaintiffs, acted pursuant to the mandate of the statute, the propriety of his action cannot be questioned in a suit brought under the provisions of the statute. In other words, that the plaintiffs cannot claim the benefit of the right to sue under the act, and at the same time deny the constitutionality of its requirement that taxes shall be paid in coin or notes only.

This objection is satisfactorily answered by the language of the act itself, which gives to the tax-payer, who pays under protest, the right to sue if he conceives the steps taken against him to be *unjust or unconstitutional*, and directs the money to be refunded if it be determined, for any reason, going to the merits of the case, that the same was wrongfully collected, etc.

It is only necessary to say further that the declaration throughout is against the defendant in his official character (*i. e.*, to recover a demand growing out of his acts *colore officii*), and that the insertion of the common counts is not only free from objection, but is in accordance with the usual practice.

The judgment must therefore be reversed, the demurrer overruled, and the case remanded for further proceedings.

JUDGMENT REVERSED.

Richmond.

RICHARDSON v. THE COMMONWEALTH.

JANUARY 15th, 1885.

1. CRIMINAL PROCEEDINGS—*Venue*.—Indictment not sustained without proof that offence was committed in county wherein venue is laid; but a strong presumption thereof raised by the evidence suffices.

Error to judgment of circuit court of Henry county, on an indictment against B. F. Richardson for the murder of Albert Richardson. The jury found accused guilty of voluntary manslaughter, and fixed his term of imprisonment in the penitentiary at five years. Prisoner's motion that the verdict be set aside and a new trial awarded him being overruled, the court entered judgment according to the verdict. To which the prisoner excepted, and obtained from one of the judges of this court a writ of error and *supersedeas*.

Wm. M. Peyton, for the prisoner.

Attorney-General F. S. Blair, for the Commonwealth.

LEWIS, P., delivered the opinion of the court.

Of the various errors assigned it is necessary to notice one only, namely—the refusal of the circuit court to set aside the verdict and grant the prisoner a new trial.

The offence is alleged in the indictment to have been committed in the county of Henry; but, as appears from the cer-

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tificate of facts proven, no proof as to the venue was submitted to the jury. The motion for a new trial ought, therefore, to have been granted. An indictment cannot be sustained without proof that the offence was committed in the county where the venue is laid 2 East's P. C. 992; 1 Chitt. Crim. Law, 557; *Gordon v. The State*, 4 Mo. 375; *Brown v. The State*, 27 Ala. 47; *Holeman v. The State*, 13 Ark. 105; *Ewell v. The State*, 6 Yerger, 364.

It has been held, however, that if the evidence raises a violent presumption that the offence was committed in the county mentioned in the indictment, it will be sufficient. *The State v. Burns*, 48 Mo. 438. In that case the prisoner was indicted for murder alleged to have been committed in the county of St. Louis. At the trial the witnesses all spoke of the crime as having been committed on a certain street, and a diagram was exhibited showing the location of the house; but it was not expressly stated that the street was in the city of St. Louis. The court instructed the jury that if they believed from the evidence that the prisoner killed the deceased in the county of St. Louis, then they should find him guilty, etc. He was convicted and sentenced to be executed, and on appeal the judgment was affirmed. See also 1 Whart. Crim. Law, sec. 601; 1 Bishop's Crim. Proc., sec. 107. But as no such presumption is raised by the evidence in the present case, the judgment must be reversed, and the case remanded for a new trial.

JUDGMENT REVERSED.

Richmond.

BATES AND ALS. v. BROWN AND ALS.

JANUARY 15th, 1885.

1. PRACTICE IN CHANCERY—*Premature hearing on merits.*—Where, in suit to remove encumbrance of a satisfied trust-deed, on demurrer, the bill is held to present a case meet for equity, and exhibits are filed tending to support such case, and the answer denies the identity of the property claimed by plaintiff with the property which had been conveyed to him, it is error for the court to determine the question of identity on the pleadings and exhibits without giving the parties full opportunity to take all desired testimony. Though the bill and exhibits may not, yet witnesses might establish the identity.

Appeal from decree of chancery court of Richmond city, entered 9th December, 1876, in suit of Henry Bates and others, heirs at law of Micajah Bates, deceased, plaintiffs, against Patrick W. Brown and others, heirs of James Brown, senior, deceased, defendants. Plaintiffs claimed that James Brown, senior, conveyed all the interests of every kind which might result to him in a certain parcel of land near Bacon Quarter Branch, in Henrico county, and certain other property, by deed of 6th August, 1825, to Samuel Taylor, trustee; that by deed of 23d May, 1844, said trustee conveyed to Thomas F. Crew all the land and all the right to land in law and equity near Bacon Quarter Branch, which had been conveyed to him by said Brown; that said land is in Duvall's addition, and consists of thirty-nine lots designated by certain named numbers; that by deed dated 27th February, 1854, said Crew conveyed the same to Micajah Bates, senior, the ancestor of the plaintiffs, who died

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in July, 1861, intestate; that part of said land was sold for taxes, and the tax-title thereto conveyed to the purchaser, Isaac A. Godwin, by deeds dated 18th February, 1857, but was regained by the plaintiffs in 1873; that by deed dated 28th October, 1824, said James Brown, senior, had conveyed the said Bacon Quarter Branch land, and other property, to Charles Copeland, Charles J. McMurdo and Robert Burton, trustees, for certain purposes; that said James Brown had also encumbered said property by another deed of same date as the last named, but that the purposes for which the trust-deeds last mentioned were executed had been fulfilled, and the trusts satisfied—and they prayed for the removal of the encumbrance of the said satisfied trust-deeds. The plaintiffs filed as exhibits the deeds above referred to, and other documentary evidence tending to support their claims. The defendants demurred to the bill, and also answered it, denying the identity of the property which the plaintiffs claimed, with the property actually sold to them. No reference of the cause was made to a commissioner to ascertain and report the facts on the question of identity, and no depositions were taken, but the cause was heard on the pleadings and the exhibits. At the hearing the court overruled the demurrer because the case presented by the bill was sufficient, but decreed that the plaintiffs' bill should be dismissed with costs, because they had failed to establish the identity of the property as aforesaid. From this decree the said Bates' heirs obtained an appeal to this court.

Sands, Leake & Carter and J. N. Dunlop, for the appellants.

H. H. Marshall, for the appellees.

LACY, J., delivered the opinion of the court.

In February, 1874, the appellants instituted this suit in the chancery court of the city of Richmond against the appellees

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to relieve certain lands in the bill mentioned from the lien of a deed in trust executed by the ancestor of the appellees, to secure the debts of creditors, subsequently paid off and discharged, alleging that before the satisfaction of the debts thus secured the appellants, or those under whom they claimed, had become the purchasers of the equity of redemption in the said lands under a sale made by the trustee in a subsequent trust-deed executed by the said ancestor of the appellees. The appellees demurred to the bill, and answered denying the identity of the property claimed by the appellants in the bill with the property actually sold to them. There were several deeds filed as exhibits with the bill—the first trust-deed of the ancestor of the appellees, James Brown, the second trust-deed, and the deed of the trustee; a certificate of the auditor was also filed in the cause, showing a transfer of the land on the land-books; and also other deeds under which they claimed their titles. The appellees, with the answer, filed the advertisement of the trustee making the sale and his account returned to the grantor in the deed. The cause was submitted to the court upon the demurrer, and the court overruled the same. Then the cause coming on upon the bills, original and amended, the answers and the replication thereto, exhibits and the examination of a witness, who had proved the signature of the trustee to the account of sales rendered by him, and the arguments of counsel, whereupon the court dismissed the bill of the plaintiffs, the appellants here, upon the ground that the plaintiffs had failed to establish the identity of the property claimed in the bill with that conveyed in the deed of trust under which the sale was had, the court saying: “The relief asked for in the bill is based upon the hypothesis that the plaintiffs have a title to the land in Duvall’s addition; for, I think, it is manifest that if that land, or if the alleged equity of redemption therein, was not sold and conveyed by Taylor to Crew, and by the latter to Bates, the plaintiffs have no right to the discovery they seek, to the accounts they ask for, to the removal of the encumbrance

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created by the deed of Brown to McMurdo, &c. (this was the prior deed), or to the release of that deed. In such case the plaintiffs would be no more entitled to such relief than any other stranger." And it held that the chancery court had no jurisdiction; that the bill made a case sufficient: that the demurrer must be overruled, and the bill dismissed without prejudice to any action at law which the plaintiffs should be advised to bring.

From this decree an appeal was allowed to this court.

The appellants insist here that the court, having overruled the demurrer of the defendants, should have allowed their prayer for a reference to a commissioner, to adduce their proofs; and that it was error to decide the cause upon the merits before the proofs were all in.

If the demurrer was properly overruled, because the bill presented a case for equity jurisdiction, the merits of the case should only be determined upon the fullest proofs on both sides which either party desired to offer. While the identity of the property may not have been established upon the bill and exhibits, it is possible that it might be upon the testimony of witnesses; at all events, it is but reasonable to allow a plaintiff, who presents a sufficient case for equity jurisdiction upon his bill, all suitable opportunity to prove his case.

The case appears to be concerning a trust, to relieve real estate from the lien of a trust-deed, duly paid and satisfied in full, but which is unreleased.

The subject is eminently one for equity jurisdiction. The identity of the property and the facts in the cause can only be duly considered and determined when the facts are all before the court. A decision upon the merits in advance of the testimony was premature, and for that reason was erroneous. It was not proper for the chancery court to decide the cause, and it would not be proper for this court to express any opinion upon the merits of the cause until the evidence is adduced on both sides.

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Without expressing any other opinion in the cause, this court will reverse the decree complained of, and remand the cause for decree for an account, and the taking of such testimony before the commissioner as either party shall desire to take, in order to a final decree therein.

DECREE REVERSED.

Richmond.

JOHNSTON v. MOORMAN.

JANUARY 29th, 1885.

1. PRACTICE AT COMMON LAW—*Instructions*.—An instruction is not considered as abstract where the pleadings show that it might apply to the case. *Shelton v. Cocke*, 3 Munf. 191.
2. IDEM—*Torts—Evidence—Damages*.—In mitigation of damages, in an action for false imprisonment, it is allowable on cross-examination to prove that the plaintiff had boasted that he had gained a great reputation from his arrest and imprisonment.
3. JUDICIAL OFFICERS—*Liability*.—When acting within their jurisdiction, judicial officers are exempt in civil actions from liability for their official acts, although such acts are alleged to have been done maliciously and corruptly.
4. IDEM—*Idem—Jury*.—In civil actions against such officers, acting within their jurisdiction, it is not for the jury to decide upon the question of the reasonableness of the grounds of the arrest.
5. IDEM—*Idem—Case at bar*.—J., mayor of D., whilst acting in his judicial capacity, caused the arrest of M., who sued J. for damages for false imprisonment.

HELD :

J. was not liable to M. in damages for such arrest and imprisonment.

Error to judgment of hustings court of Danville, rendered 9th January, 1883, in an action of trespass on the case for false imprisonment, wherein W. A. Moorman was plaintiff and John H. Johnston was defendant. The defendant was mayor of Danville, and claimed to be acting in his judicial capacity when he caused the arrest and imprisonment of the plaintiff. At the trial the jury found a verdict for \$2,000 damages in favor of the plaintiff, and the court entered judgment accordingly. To

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this judgment Johnston obtained, from one of the judges of this court, a writ of error and *supersedeas*.

Opinion states the case.

W. W. Gordon and Green & Miller, for the plaintiff in error.

Berkeley & Harrison, for the defendant in error.

RICHARDSON, J., delivered the opinion of the court.

The main question for decision in this case is whether the mayor of a city or town acting within his jurisdiction and arresting offenders, actual or supposed, can in any case be held liable for damages, however erroneous his action, and though prompted by malicious or corrupt motives.

The facts as certified are these: On the night of August 11th, 1882, there was a public meeting in the town of Danville, which was addressed by John E. Massey, just before which one J. J. Wilkinson had an affray or row on the street with one A. J. Clark; that during the affray or row one J. G. Boney, a stranger in Danville, cried to Clark "hit him," which greatly incensed Wilkinson; that Moorman, the plaintiff below and defendant in error here, was not present or in any way concerned in that row. That the defendant in error introduced Mr. Massey to said meeting, remained upon the speakers' platform with him until the meeting adjourned, and then accompanied him to the hotel, and thence went to the billiard-room of C. T. Brown, just across Union street from the hotel, where he found S. P. Watkins, J. J. Verser, ——— Anderson and J. G. Boney playing a game called pool, joined them and was introduced to Boney.

That the proprietor of the place then announced that he was going to close the bar-room, as he had been up late the night before, and was tired (it was then about 11:30 o'clock); whereupon the party all took a drink (the defendant in error testi-

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fied that he took only one drink, and the witness, J. J. Verser, testified that Moorman, according to his recollection, took two drinks while at Brown's saloon). That the bar was then closed, and the party continued their game until it became the turn of J. J. Verser to treat, when (Brown's bar being closed) he invited the party to go to the Border House saloon of Nicholas & Hessberg, on Main street, and on the lower end of the same square, where the party arrived about 12:30 o'clock, and found the plaintiff in error, J. H. Johnston, the mayor of Danville, and one S. H. Yates, and all took a drink of beer together, at the invitation of Boney, after which they sang a song, in which Moorman and Johnston joined, and some of the party danced, and Johnston, the mayor and plaintiff in error here, "skipped round a little," but there was no disorderly conduct.

That shortly afterwards, while the party were quietly conversing and discussing politics, the barkeeper, M. J. Hessberg, hearing a noise in the front room of the bar, which was separated from the rear room, in which the parties were, by a partition and door of lattice work, went forward and found the said J. J. Wilkinson and one Wiley Brown; that Wilkinson looked through the door, and, pointing to Boney, asked who he was, and upon being told his name, immediately pushed the door open, rushed violently in, and in an angry voice cried out to Boney: "You are the God damned rascal who urged Clark to hit me," and immediately advanced on him, cursing him and menacing him. Boney retreated toward the rear end of the room, and Johnston, the mayor, duly elected, qualified and acting as such, immediately intercepted Wilkinson, took hold of, and commenced to push him toward a side door opening on Market street, out of which he finally pushed him into the street.

During this scuffle the barkeeper said: "Gentlemen, you must become quiet, or I will call a policeman;" to which Johnston replied: "I am the mayor, and I command the peace." The witness, S. H. Yates, assisted Johnston in ejecting Wilkin-

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son, and then returned to where Boney was, Johnston remaining on the street with Wilkinson, who was very noisy, and continued to curse and threaten Boney—Johnston endeavoring to quiet him. The cursing and noise made by Wilkinson attracted the attention of two policemen, J. H. Cook and C. G. Freeman, who were some distance off, but immediately came up and took a stand near the front door of the saloon, on Main street, Johnston and Wilkinson then being just across Market street at the corner of Main.

Immediately after the mayor had ejected Wilkinson, S. H. Yates took Boney and led him through a door into a passageway at the rear end of the bar-room; and Boney, as he was going out, called Moorman, the defendant in error, to him, saying he would rather have the advice of two than one, and that he wanted him and Yates to effect an honorable or peaceable settlement for him, to which Moorman replied that, as a friend to both parties, he would endeavor to effect a peaceable settlement. That Boney said he was unarmed, and wished to go to his home, and seemed afraid to go out on the street.

Moorman then went to where the mayor (Johnston) and Wilkinson were (Wilkinson then having become quiet), and, addressing Wilkinson, said: "Captain John, Boney is in the bar there, afraid to come out and go home; he says he wants you to let him come out and go home, that he is unarmed, and does not wish to be attacked unprepared." To which Wilkinson replied: "Tell him to come out and go home, that I am no damned assassin." And then Moorman said: "He says he will meet you to-morrow and settle the matter;" and Wilkinson replied: "I will meet him any time and any where;" to which Moorman replied: "You are both drunk to-night, and to-morrow there will be nothing of it; I don't know that he wants to fight you at all." And Wilkinson said: "I am not drunk; I have not taken a drink for five hours." Thereupon Mayor Johnston, addressing Moorman, said: "Go away from here; I am mayor, and I intend to settle this matter, and if you

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don't go away I will send you to jail." To which Moorman replied: "Mayor Johnston, I recognize you as mayor, but I have done nothing for which to be sent away, and don't like to be sent away unless I have done something." The mayor then said to Policeman Cook: "Take that man to jail." Moorman then said: "Well, if you say so, I must submit," and started off with the policeman who, in pursuance of the mayor's order, had arrested him; but after proceeding a few steps asked to be allowed to return, which was permitted, and he then said, in a quiet and peaceable manner: "Mayor Johnston, I have done nothing, and demand a trial, or to be allowed to give bail." To which the mayor replied, angrily: "Damn it, take him to jail." The policeman then took him into that part of the jail building occupied as the jailer's room, and delivered him into the custody of the jailer, who took the keys, and was proceeding to carry him into the cells, when Moorman requested permission to write a letter to his employer; and while they were engaged in looking for pen and paper, a policeman came with an order for the release of Moorman. ♦

After Moorman was released, he met with Wilkinson on the street, and they were together some time, talking on what had transpired, in a friendly manner. Moorman asked for and got Wilkinson's version of the affair, stating at the time that he intended to sue Johnston. In response to Wilkinson's version Moorman said: "If you stick to that I am all right, and will be willing to divide;" to which Wilkinson replied: "You cannot bribe me." In response Moorman immediately disclaimed any intention to offer a bribe, and said that he had used the expression merely to indicate that he was indifferent as to the money, but merely wished to vindicate his conduct, and set himself right in the community.

Shortly after Moorman was arrested and sent to prison the witness Verser came to Wilkinson, in the presence of Mayor Johnston, with a message from Boney, to the effect that he (Boney) was willing to meet Wilkinson the next day, and

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fight him with pistols, bowie-knives, shot-guns, or any other weapons; and that Mayor Johnston did not cause or threaten to cause his arrest, and took no steps to arrest or cause the arrest of either Boney or Wilkinson.

In addition to the foregoing facts, the court below certifies that Moorman testified that he had felt deeply humiliated and mortified at the arrest, and had on that account been unable to sleep afterwards.

That the witness Hessberg testified that immediately after Wilkinson had been ejected from the saloon Moorman said, referring to Wilkinson: "That man ought to have a bullet through him;" that thereupon Hessberg said to Moorman: "You had better not have anything to do with this row or you will get into trouble;" to which Moorman replied: "I have not, and don't intend to;" but there was no evidence that these remarks were communicated to either Wilkinson or Johnston. On reëxamination Moorman denied using the language above, which called forth Hessberg's caution to him; but said that he did say something in an under-tone, the exact purport of which he did not recollect, but that he recollected Hessburg's caution and his reply as stated.

That Mayor Johnston testified that, as he was trying to put Wilkinson out of the saloon, Moorman caught hold of him, Johnston, and said: "When a man has been badly treated he ought to have some showing;" that he had thereupon slapped or shoved Moorman off from him and against the wall. That while he was out in the street, when Moorman came out to Wilkinson, he thought Moorman was bearing a challenge; and that he caused his arrest with a view to prevent a breach of the peace, and had no malice or ill-will against him, but acted only from a sense of duty. Moorman in his testimony denied that he took hold of either Johnston or Wilkinson, and stated that he did not bear any challenge between said parties, but was only acting as a peace-maker. That the witness Yates stated that he was the person whom Johnston shoved back. That the

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witness Hessberg stated that during the scuffle between Wilkinson and Johnston and Yates, Moorman was standing about the middle of the bar and not taking any part. That the witness Verser stated that Moorman was at the lower end of the room, near him and Boney.

And the court further certifies that Johnston further stated that he did not hear Moorman offer bail and demand a trial; but the witness Wilkinson, who was near Johnston, the policeman Cook, who was with Moorman, and the policeman Freeman, who was a little distance off, all testified that they heard it, and Johnston's reply: "Damn it, take him to jail;" and that Moorman swore that he made the demand and received the reply. That the witnesses Yates, Wilkinson, Verser, Hessberg, Cook and Moorman all testified that Moorman during the whole time conducted himself in a quiet, orderly and peaceable manner, and did not participate in any disturbance or act in a riotous manner, though Johnston testified that he did.

And the court below further certifies that it was proved by both plaintiff and defendant that up to the occurrences of the night the relations between them had been kindly and friendly.

Such are the facts certified as material by the court below. It is obvious that many of them are not only immaterial and not properly facts proved, but matters about which the testimony is conflicting, as shown on the face of the certificate itself.

In August, 1882, W. A. Moorman instituted in the hustings court of Danville his action of trespass on the case for false imprisonment against J. H. Johnston. The declaration charges that on 11th of August, 1882, the defendant, without reasonable or probable cause, and to gratify personal and political spite and antagonism to the plaintiff, maliciously caused him to be arrested by policemen of said town and cast into prison. In his defence the defendant filed a plea of not guilty, and four special pleas to the effect that at the time of the alleged false imprisonment he was the duly elected and qualified mayor of

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said town of Danville, and in virtue thereof a justice and conservator of the peace of the State of Virginia, in and for said town, and that in the discharge of his duties as such official, and in order to preserve and restore the peace and good order of said town and State, and without any malice or ill-will whatever against the plaintiff, he caused the plaintiff to be arrested whilst engaged in sundry violations of the laws, as particularly designated in said pleas. Upon the issues joined on these pleas a jury was impanelled, which returns a verdict of \$2,000 for the plaintiff, and judgment was rendered accordingly, to which the defendant obtained, from one of the judges of this court, a writ of error and *supersedeas*. During the trial four bills of exceptions were taken by the defendant to the rulings of the court. The fourth bill of exception sets out the facts proved substantially as stated above.

The plaintiff in error sets out in his petition several assignments of error.

I. That the court erred in refusing to allow the defendant, upon cross-examination, to ask the plaintiff's witness, J. J. Wilkinson, whether he did not hear plaintiff say, after he was discharged from prison, that he, the plaintiff, had made a great reputation by what had taken place—to which question the plaintiff objected, and the court refused to allow the question to be asked.

The damages claimed in the plaintiff's declaration is for the alleged injury inflicted upon his reputation, and the humiliation upon him by reason of the arrest. These being at issue, and the facts certified showing that there was nothing whereon to base such claim unless it might be in these respects, and the witness having stated upon his examination in chief that the plaintiff had introduced Mr. Massey to the audience on the night of the arrest in question, and the witness having given in his examination in chief a detailed account of the plaintiff's conduct and action on that night, both prior and subsequent to the arrest, it was clearly within the scope of cross-examination

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to show that, so far from being humiliated by the arrest, the plaintiff exulted in the reputation he had thereby acquired. And such being the evident object of the question rejected, we are of opinion that this assignment of error is well taken.

II. That the court erred in refusing the first instruction asked for by the defendant. That instruction is as follows: "That every judicial officer is exempt from liability in damages for his actions in matters within his jurisdiction, even though his judgment and actions based thereon should prove to be erroneous."

It cannot be doubted that this instruction correctly propounds the law.

In his admirable work on Torts, pages 408, 409, 410, Judge Cooley says: "Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the State says to the officer that these duties are confided to his judgment; that he is to exercise his *judgment* fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the State, and the peace and happiness of society; that if he shall fail in a faithful discharge of them he shall be called to account as a criminal; but in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer.

"The rule thus laid down applies to large classes of officers, embracing some the powers attached to which are very extensive, and others whose authority is very limited. It applies to the highest judge in the State or nation, but it applies also to the lowest officer who sits as a court and tries petty causes."

That there are cases seeming to hold, as contended by counsel for the defendant in error, that a justice is civilly responsible

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when he acts maliciously or corruptly, is true. But Judge Cooley, after a careful analysis of a long line of authorities, reaching from Coke down to the present, says: "There are *dicta* in some cases that a justice is civilly responsible when he acts maliciously and corruptly, but they are not well founded, and the express decisions are against them." Cooley on Torts, 409, note 2.

In *Scott v. Stansfield* (3 Law Reports, Exchequer, 220) a judge of a county court was sued for slander. He pleaded that the words were spoken by him in his capacity as judge, while trying a case wherein the plaintiff was defendant. The plea was held to be a valid defence, the Chief Baron saying: "This doctrine has been applied not only to the superior courts, but to the court of a coroner, and to a court-martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

In *Randall v. Brigham*, 7 Wall. 523, Mr. Justice Field said: "It is a general principle, applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, *unless, perhaps, when the acts, in excess of jurisdiction, are done maliciously or corruptly.*" I italicise the very important qualification to the rule as stated by the learned judge, the importance of which will presently be seen.

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In the subsequent case of *Bradley v. Fisher*, 13 Wall. 335, Mr. Justice Field also delivered the opinion of the supreme court, in the course of which, after a careful review of all the authorities, he explains the sense in which he uses the above-noted qualifying words in *Randall v. Brigham*, and says: "They were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remained unqualified it would require an explanation of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine." And he proceeds: "In the present case we have looked into the authorities and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable in civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." But the learned judge proceeds: "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, where the want of jurisdiction is known to the judge, no excuse is permissible."

With this lucid explanation of the qualifying words used in stating the doctrine in *Randall v. Brigham*, *supra*, and made by the judge who delivered both opinions, no possible doubt remains, and the doctrine remains unshaken that all judicial officers, whether inferior or superior in grade, are, when acting within their jurisdiction, exempt from liability in civil actions for their judicial acts, though alleged to have been done ma-

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liciously or corruptly; that judges of courts of superior, general jurisdiction, though acting in excess of their jurisdiction, and although such acts be alleged to have been malicious or corrupt, are not so liable, except where there is a clear absence of all authority as contradistinguished from mere excess of authority, acts in the clear absence of all jurisdiction—being usurpations and inexcusable. But with regard to judicial officers of inferior limited jurisdiction, the doctrine is that they must keep within their jurisdiction, and are liable to civil action for acts done in excess thereof, especially if such acts be prompted by malicious or corrupt motives.

“It is universally conceded,” says Judge Cooley, “that when inferior courts or judicial officers act without jurisdiction, the law can give them no protection whatever.” And referring to *Bradley v. Fisher*, *supra*, he says: “Recently, however, the rule has been held to be otherwise in the case of judges of the superior courts when the error consisted in exceeding their authority.” And the learned author says: “Had it been a justice of the peace who had committed a like error, an action would have been supported, however honest might have been his motives, and however plain it might have appeared that he was intending to keep within his powers.” Cooley on Torts, 419–20. On the same page the learned writer proceeds to show why the law would protect the one judge and not the other, and why, if it protects in such case only one, it should be the very one who, from his high position and presumed superior learning and ability, ought to be most free from error.

In *Burch v. Hardwicke*, 30 Gratt. 41, it was held that the mayor of Lynchburg had no jurisdiction to remove Hardwicke, who was not a municipal, but a State officer, and that he was prompted by malice in making the removal, and that, therefore, the mayor was liable in damages to Hardwicke. It is evident that that case was intended by the able judge who delivered the opinion to rest on the distinction taken in *Bradley v. Fisher*, *supra*, between a case where the judge or other officer

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had *no* jurisdiction of the subject matter, and a case where the judge or other officer acted *in excess* of his jurisdiction—and not on the difference between the judges or other officers as respects whether their courts were of superior or of inferior jurisdiction.

In *Stone v. Graves*, 40 Am. Dec. 131, it was held that a justice of the peace was not liable in a civil action, when acting judicially, and within the sphere of his jurisdiction, however erroneous his decision or malicious his motive. See also *Yates v. Lansing*, 6 Am. Dec. 303; *Ramis v. Simpson*, 50 Texas 495; 32 Am. Rep. 609, where is adopted the language of Beardsly J., in *Weaver v. Drundoff*, 3 Denio 117, that the rule exempting judges and other officers from liability in a civil suit for a judicial determination, however erroneous or corrupt, extends to all public officers from the highest to the lowest. See also 1 Minor's Ins. 108.

Discussing the question whether persons required to perform ministerial acts, and who are at the same time invested with the judicial character, are responsible in damages, Lord Brougham, in *Ferguson v. Kimoul*, 9 Cl. & Fin. 251 (referred to in Brown's Legal Maxims, page 94–5), says: "Even inferior courts, provided the law has clothed them with judicial functions, are not answerable for errors in judgment; and where they may not act as judges, but only have a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, and however injurious its consequences, they shall not answer for."

In view of all the authorities there can be no doubt that the first instruction asked for by the defendant rightly stated the law. But for the appellee, it is contended that it is an abstract proposition. An instruction is not considered as abstract where the pleadings show that it might apply to the case. *Shelton v. Cocke*, 3 Munf. 191. To the case at bar certainly the principle of law propounded by that instruction is expressly applicable. Hence it is not open to the alleged objection. But

it is also contended that the instruction is wrong, inasmuch as it proceeds on the assumption that Johnston was a judicial officer. That he was such there can be no question. He was mayor and *ex officio* a justice of the peace. In Virginia, with very few exceptions, the functions of a justice of the peace are judicial in character. 1 Minor's Ins. 108. When a justice considers a case upon the evidence and the law, and decides it, however the case is presented to him, whether formally or informally, whether it be civil or criminal, whether he decides upon the testimony of sworn witnesses or upon the evidence of his own senses, he acts judicially, and he that executes his decision acts ministerially. The fact that a judge or justice sometimes acts ministerially makes him none the less a judicial officer. At all events, the case here exhibited in the pleadings and facts certified would fully warrant any tribunal in arriving at the conclusion that Johnston, on the occasion of the arrest of Moorman, acted in his judicial capacity. Nor is there any evidence that he acted through personal spite or maliciously towards Moorman.

The grave importance of the case has induced us to set out in full the facts as certified. It must be apparent to every one that the really material facts are very few, and are confined to what occurred in the "Border Saloon" and just outside thereof, leading to and including Moorman's arrest by Johnston.

It is appropriate here to recur very briefly to those facts.

At a late hour at night Moorman and his party went to the "Border Saloon," in the bar-room of which they found the mayor (Johnston) and others. All hands took a drink, and then followed a quiet discussion of politics, with the singing of a song by one of the party, and a gleeful dance, in which Johnston participated, to the extent of skipping around a little, conduct not comporting gracefully with the dignified position of mayor, yet immaterial to the issue here. Soon Wilkinson entered the front door, and pushing the lattice door open discovered Boney with the party in the bar-room; asked who he

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was, and being informed, immediately pushed the door open, rushed violently in, and angrily cried out to Boney: "You are the G——d damned rascal who urged Clark to hit me!" and immediately advanced on Boney, cursing and menacing him. Johnston at once intercepted Wilkinson in his violently aggressive career—took hold of him—saying: "I am the mayor, and I command the peace;" and after a scuffle, with aid, put Wilkinson out at the side door, and diagonally across the cross street, to the corner of that with Main street, and there succeeded in quieting Wilkinson. Two policemen had heard the disturbance, and came up, and were near by. Thus situated, there was necessarily between the corner where Johnston detained Wilkinson, and where they were, and the front door of the "Border Saloon," something more than the width of the cross street; so that had he really desired to do so, Boney could have passed out at the front door, and gone quietly away. But evidently such was not Boney's real purpose. That this is so, let us look to what occurred in the saloon and outside, near by, immediately after Wilkinson was ejected by Johnston.

S. H. Yates, one of the bar-room party, led Boney through a door in the rear end of the bar-room and into a passage; but as Boney retired he called Moorman to him, saying he preferred the advice of two rather than one; and desired Moorman and Yates to effect a peaceable or *honorable settlement*. Moorman, claiming to be friendly to both, undertook to effect a peaceable settlement. It is important to see just here how Moorman proceeded on his mission of peace, especially as Johnston's theory is that he thought Moorman was bearing a challenge from Boney to Wilkinson, and therefore the arrest. Moorman accordingly went out on the street where Johnston was with Wilkinson, the latter having become quiet, and, addressing him (Wilkinson) as "Captain John," said; "Boney is in the bar there, afraid to come out and go home; he is unarmed, and does not wish to be attacked unprepared." This was certainly but little in the direction of a peaceable settlement.

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However, Wilkinson replied: "Tell him to come out and go home, that I am no d——d assassin." But Moorman, instead of taking the message to Boney, promptly replied: "He (Boney) will meet you to-morrow, and settle the matter." This surely and directly imported a hostile meeting; and Wilkinson so took it, for he instantly replied to Moorman: "I will meet him any time and any where." Then it was that Moorman moderated what he had last said by saying to Wilkinson: "You are both drunk to-night, and to-morrow there will be nothing of it; I don't know whether he wants to fight you at all."

It was the threatening language of Moorman which doubtless impressed Johnston, as it did Wilkinson, that a hostile meeting was contemplated, and caused Johnston to order Moorman away. This was clearly his duty, under the circumstances, and it was as clearly Moorman's duty to obey, Johnston asserting: "I am mayor, and I intend to settle this matter; and if you don't go away, I will send you to jail." But Moorman remained and remonstrated with Johnston, an officer of the law, plainly in the discharge of his duty, the preservation of the peace and order of the town of which he was the mayor. In remaining and refusing to depart, Moorman was certainly obstructing the officer of the law in the discharge of a duty to the public imposed by law, and Moorman's actions, to say the least, tended to reöpen the dangerous strife which Johnston for the time being had quelled.

Under these circumstances the arrest was ordered by Johnston. Looking impartially at the facts, it is impossible to conclude that he in any particular even strained his authority.

We repeat there can be no question that the act of Johnston complained of was done in the discharge of a judicial function. Indeed, the instruction given by the court, in lieu of the seventh instruction asked for by the defendant, concedes the judicial character of Johnston on the occasion in question. For these reasons we are of opinion that the hustings court erred in

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refusing to give the said first instruction asked for by the defendant.

III. The court erred in refusing the said seventh instruction, and in giving in lieu thereof another, to-wit: "That if the defendant, being a conservator of the peace, with the power to apprehend offenders, had reasonable grounds for believing, from the action of the plaintiff, that the plaintiff was engaged, or about to engage, in a breach of the peace, or commit a felony, or was engaged in carrying or delivering a challenge to fight from one Boney to one Wilkinson, in the presence of the defendant, or that the plaintiff was, with others, riotously, tumultuously, or unlawfully acting at a public place in Danville, or that the plaintiff was engaged or about to engage in an affray, the defendant had the authority under the law to arrest and imprison the plaintiff, although the plaintiff was in fact not engaged or about to engage in either of the above-named acts; and if they so believe, it will be their duty to find for the defendant."

Very little need be said as to this assignment. Whether the seventh instruction, asked for by the defendant, was proper or not, it is not necessary to decide, as there is no room to doubt that the substitute was erroneous and should not have been given. The instruction given makes the jury the judge of the reasonableness of the grounds of the defendant's action as to a matter within his judicial jurisdiction and discretion. It takes away from the defendant the right to judge whether ground for arrest existed, and refers it as a question of fact to the jury to be by it decided, not from what happened in the sight and hearing of the defendant, but from evidence adduced before the jury. This was not a proper question to be left to the jury. 2 Addison on Torts, 877.

In the view of the case already expressed it is unnecessary to notice the remaining assignments, as, for the errors already noticed, the judgment of the hustings court must be reversed, and the verdict of the jury set aside, with costs to the plaintiff

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in error, and the case remanded to the hustings court of Danville for a new trial, at which, if instructions should be asked for, such instructions shall be given in accordance with the views set forth in this opinion.

HINTON, J., dissented.

JUDGMENT REVERSED.

Richmond.

STROTHER'S ADM'R AND ALS. V. MITCHELL'S EX'OR AND ALS.

JANUARY 29th, 1885.

1. LEGACIES—*Advancements—Ademption*.—Where one *in loco parentis* gives a legacy as a portion, and *afterwards* advances in the nature of a portion to same person, such advancement will be deemed an ademption of the legacy. *Hansborough v. Hooe*, 12 Leigh, 322. But where the gift is given *before* the making of the will, and the will does not charge it as an advancement, the court cannot so charge it in settling the estate. Code 1873, chapter 118, section 12.
2. CO-SURETIES—*Contribution*.—Where principal is insolvent, surety, against whom judgment has been rendered, may have judgment against his co-surety for his share of the debt. But unless such judgment has been rendered, such surety cannot have judgment against his co-surety. Code 1873, chapter 144, section 8.
3. EVIDENCE—*Post-Admissions of Assignor*.—A letter written by a distributee, after assigning his share of the estate, is not admissible as evidence for any purpose in suit to settle the estate.
4. DECREES—*Who bound by*.—One not a party to the suit is not bound by any proceedings or decrees therein.

Argued at Staunton, but decided at Richmond.

Appeal from two decrees of circuit court of Frederick county, rendered 17th May, 1884, and 12th June, 1884, respectively, in the chancery cause of Mary Mitchell's executor against J. T. Strother's administrator and others.

Mary W. Tuley held J. T. Mitchell's bond, dated 30th October, 1860, for \$1,561.15. Mary Mitchell and J. T. Strother were sureties thereon. In 1866, after the death of the sureties,

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judgment was had on the bond against J. T. Mitchell alone. Under Mary Mitchell's will, J. T. Mitchell, who was her son, was a legatee, and he assigned his interest in her estate to Mary Tuley to pay the bond. In 1879, in the circuit court of Clarke county, Xaupi, who was also a legatee, sued for a settlement of the estate. Mary Tuley was made a party, and received the amount of the bond out of J. T. Mitchell's interest. In 1882, in that suit, Master Moore filed a supplemental report, founded on a letter of J. T. Mitchell, dated 1880, which admitted he had received from his master before the making of her will an advancement, which, the master stated, satisfied his legacy, so that he had no interest in the estate when he made the assignment to Mary Tuley. In 1882 a decree was entered confirming the supplemental report. In 1883, in the circuit court of Frederick county, Mary Mitchell's executor sued the administrator, &c., of J. T. Strother, deceased, for contribution of one-half of the sum which had been paid out of her estate in satisfaction of said bond, and based the claim on the said report which had been confirmed as aforesaid, and on the theory that it had been so paid by reason of the said suretyship. The administrator of J. T. Strother answered alleging, among other things, that the bond had not been paid out of Mary Mitchell's estate, but out of J. T. Mitchell's interest in that estate; and that the said report, and the decree confirming it, were not binding upon his intestate's estate, because it was unrepresented in that suit, and also that the said letter was not admissible evidence to sustain the report.

But upon the hearing, the circuit court of Frederick county, on 12th June, 1884, decreed that, it appearing that the estate of Mary Mitchell had paid the whole of the said bond by reason of said suretyship, it was entitled to recover from the estate of J. T. Strother, upon the principle of contribution among co-sureties, one-half of the amount so paid by it, and ordered that Barton and Boyd, out of money in their hands belonging to the estate of Joseph T. Strother, pay to J. T. Thomas, the execu-

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tor of Mary Mitchell, the sum of \$60, with interest thereon from 15th December, 1879, and the further sum of \$1,436.99, with interest thereon from 22nd January, 1882, and the costs of the suit—the balance so paid by Mary Mitchell's estate having been barred by the statute of limitations. From this decree J. T. Strother's administrator obtained an appeal to this court and a writ of *supersedeas*.

T. W. Harrison, for the appellants.

M. McCormick, for the appellees.

LACY, J., delivered the opinion of the court.

The appellee, Mary Mitchell's executor, filed his bill in October, 1883, alleging, that on the 30th day of October, 1860, Joseph T. Mitchell, as principal, and J. T. Strother and Mary Mitchell, as co-securities, had executed a bond for \$1,561.15 to Mary W. Tuley, administratrix of Joseph Tuley, deceased; that the estate of Mary Mitchell, his testatrix, had been compelled to pay the whole debt, in a suit in the circuit court of Clarke county, in the name and style of *Xaupi v. Mitchell's ex'or*; that Joseph T. Mitchell, the principal, was a bankrupt, and that Mitchell's executor was entitled to have contribution of J. T. Strother's estate, as co-security, and to attach a fund under the control of the court. To this bill the administrator and the widow and children of J. T. Strother demurred and answered.

Passing by the questions raised by the demurrer, the answers denied the joint obligation of Strother and Mitchell—denied that Mary Mitchell's estate had paid the debt—that it was paid by the estate of Joseph T. Mitchell—and alleged that Mrs. Tuley was the assignee of the interests of Joseph T. Mitchell in the estate of his mother, Mrs. Mary Mitchell; that the record of the said suit of *Xaupi v. Mitchell's ex'or*, in the circuit court of Clarke county, exhibited in this suit, showed this; that the record of the said last-named suit showed, moreover, that J. T. Strother's administrator was not a party to that suit, and

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that the defendants who were entitled to the estate of J. T. Strother, deceased, were not in any way concluded by the proceedings in that suit; that in 1866 the obligee in the Mitchell bond had recovered a judgment against Joseph T. Mitchell alone, and had not sued either Strother or Mrs. Mitchell; that the suit of *Xaupi v. Mitchell* was a suit for the settlement of the executorial accounts of the executor, and for division and distribution of the Mitchell estate; that in this suit Mrs. Tuley was brought in by an amended bill, and answered, claiming to subject the interest of Joseph T. Mitchell to the payment of his debt to her, and exhibited an assignment executed by Joseph T. Mitchell to her of his entire interest under his mother's will; that this claim of Mrs. Tuley, as assignee, was allowed, and the share due her assignor, Joseph T. Mitchell, paid to her; that the interest of Mrs. Tuley in the suit then ceased; and that afterwards a letter of Joseph T. Mitchell, written to his sister, the wife of the executor, in 1880, admitting an advancement of \$3000 by his mother, the testatrix, which was to be a charge against him in the distribution of his mother's estate; that the accounts were then reformed, and it was ascertained that the said Joseph T. Mitchell would then have no interest in the estate, and the payments made to Mrs. Tuley, on account of the Jos. T. Mitchell debt, credited to the executor as payments on account of Mrs. Mitchell's estate as security on the Tuley bond, and then the residue divided among the persons entitled to the Mitchell estate other than Jos. T. Mitchell.

The circuit court held that the *Xaupi* suit showed that Mitchell's estate had paid the amount of the Tuley bond as surety, and that Strother's estate was bound as security to contribute one-half of this sum to the Mitchell estate, except as to sums barred by the statute of limitations, and decreed out of the money in the hands of the court in another suit, the payment to Mitchell's executor of the sum of \$60 as of December 15th, 1879, and of \$1,436.99 as of January 22nd, 1882, with interest,

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by Barton & Boyd, out of the funds in their hands belonging to the estate of Joseph T. Strother, and retired the cause from the docket as an ended cause.

From this decree, which was entered June 12th, 1884, and the subsequent decree rendered in the cause on the 14th day of June, correcting a clerical error in the former decree, an appeal was allowed to this court.

It appears from the record of this cause that the estate of Joseph T. Strother was in no way represented in the Xaupi suit; that there was nothing in the proceedings in that suit, up to the payment of the Tuley debt, that indicated or suggested that Strother's estate was interested up to that time.

Mrs. Tuley had no interest in the question whether her debt was paid by Mrs. Mitchell as security, or paid by the executor out of the share of Joseph T. Mitchell; but Joseph T. Strother's administrator, and the widow and children of Joseph T. Strother, have a deep interest in that question, as abundantly appears by this suit; as in the one case there was no liability on them, whereas by the other solution a large and ruinous liability has been fixed upon them by the decree herein. The advancement was made, if actually made at all, before the will of Mrs. Mitchell was executed—there was no reference to the advancement made in the will—and an inspection of the will shows that a difference was made therein in favor of the other children. It was the privilege of Mrs. Mitchell to charge this advancement to her son in her will, if she chose to do so, but if she did not do so, and did not so intend to charge it, it is not in the power of any other person to do so. The larger provision in her will for others may have been her way of doing this. Our statute provides that "a provision for, or advancement to, any person shall be deemed a satisfaction in whole, or in part, of a devise or bequest to such person in a *previous* will," &c.

In the case of *Moore v. Hilton*, 12 Leigh 1, this court held that an advancement to a child made *subsequent* to a will is to

be taken as a satisfaction of a legacy to that child, *pro toto*, or *pro tanto*, according to its amount.

In the case of *Hansborough v. Hooe*, 12 Leigh, 322, the question arose under the will of a grandfather, where Judge Cabell held for the court that the rule is well settled that when a parent, or person *in loco parentis*, gives a legacy as a portion, and afterwards, upon any occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will, and this court will presume he meant to satisfy the one by the other, citing Lord Eldon, in *Trimmer v. Bayne*, 7 Ves. 508, and *Jones v. Mason*, 5 Rand. 577, and this with reference to real estate as well as to personal estate.

This is well settled, and we do not mean to contradict the principle; it is a part of the statute law of the State.

But it nowhere appears when this sum of \$3,000 was advanced, if at all. It is a most important question to the appellants, and they have a right to be heard to contest the question before their rights are passed upon. The will was executed in 1862. Strother's administrator claims that if any advancement was made to Joseph T. Mitchell at all, it must have been in the years 1860 or 1861. But upon this point no proof has been taken. The will was admitted to probate in 1865. Strother's administrator complains that there was no proof taken to prove the letter; that it was dated in 1880—long after—eighteen years after the date of the will, and fifteen years after the death of Mrs. Mitchell, and that it was dated long after the alleged writer, Joseph T. Mitchell, had assigned all his interest in the estate to his creditor, and long after he had been adjudged a bankrupt, and when he had no interest in the subject; that it must have been admitted by the commissioner, and acted on by the court, as an admission against interest, but that it cannot be so regarded; that it was not evidence for any purposes. And he further contends that the commissioner who so admitted it was the counsel in the cause, and drafted both the

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original and amended bills; that it was of no concern to Joseph T. Mitchell, the supposed writer, and in the interest of the person who offered it, and in no way concerned Mrs. Tuley, the creditor, who had been paid her debt as the assignee of Mitchell, and gone out of the cause. Mrs. Tuley claimed to be paid this debt of Joseph T. Mitchell, in her answer as the assignee of the said Joseph T. Mitchell, and although she asserts another debt against Mrs. Mitchell, she does not hint in her answer that Mrs. Mitchell is bound to her as surety for this debt of her son, Joseph T. Mitchell.

After Mrs. Tuley had been paid her debt, as the assignee of Jos. T. Mitchell, in which capacity alone she claimed it, never having asserted any claim for it against Mrs. Mitchell in this or any other suit, so far as this record shows, and been paid another debt which she did claim against Mrs. Mitchell, the following appears in the record:

“COMMISSIONER'S OFFICE,

“*April 11th, 1882.*

“I have been *requested* to make the following supplemental statement, in addition to my report heretofore filed in this cause:

“A letter of Jos. T. Mitchell, addressed to Mrs. J. T. Thomas, I suppose, beginning ‘Dear Belinda,’ and concluding ‘Your affectionate brother, Jos. T. Mitchell,’ and dated December 3d, 1880, has been laid before me.”

By whom! There is no sponsor for it in the record. In this letter *he* acknowledges the receipt by himself of \$3,000 from Mrs. Mary Mitchell during her life, which sum he says she permitted him to keep on account of his interest in her estate.

Where is this letter? It is not in the record; there was no party to the cause who so required, and it is not exhibited with the report of the commissioner.

We do not intimate that there is no such letter. But has not

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Strother's administrator a right at least to see it, and inspect it? It has proved fatal to all the interests of Strother's children.

The commissioner then adds: "In the report heretofore made by me he has not been charged with this sum. It should be charged against him as an advancement. I have no information as to the time of Mrs. Mitchell's death, but her will was admitted to probate on the 30th day of November, 1865. In the statement below I have charged interest on the sum of \$3,000 from the 1st day of December, 1865."

This is all the commissioner says on this very important point; but it is quite enough to show that this letter was the sole ground for the change in the situation. It was not deemed necessary to prove its execution, nor was it considered necessary to ascertain with certainty to whom it was written or when delivered—the commissioner supposes that it was written to the wife of the executor, Mrs. Thomas. He does not pause long enough to tell us who presented the letter, or who requested him to make this new and supplemental report. Perhaps it did not and obviously it did not concern any party in that cause to inquire concerning these things. To them it was a matter of great gain to have it all so settled; but the effect, as we have seen, under the decision of this case in the circuit court, was to destroy the property rights of the appellants in this cause *without proof—without a hearing*, in a cause to which they were not invited nor admitted as parties, the circuit court holding that it appeared that the estate of Mrs. Mitchell had paid the whole of this debt for which the said Mary Mitchell and J. T. Strother were co-securities, and Mary Mitchell's estate was entitled to contribution therefor from Strother's estate.

Our statute provides that if the principal debtor be insolvent, any surety, or his personal representative, against whom a judgment or decree has been rendered on the contract for which he was surety, may obtain a judgment or decree by motion in the court in which the former judgment or decree was

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rendered, against any co-surety, or his personal representative, for his share in law or in equity, of the amount for which the first-mentioned judgment or decree may have been rendered; and if the same has been paid, for such share of the amount so paid, with interest thereon from the time of such payment.

Was any judgment or decree rendered against the estate of Mrs. Mary Mitchell for this debt of Joseph T. Mitchell? If so, in whose favor was it rendered, when so rendered against Mary Mitchell's estate? It was not so rendered in favor of Mrs. Tuley, for her debt was paid her as against the interest of Jos. T. Mitchell, claiming under his interest in, not against Mrs. Mitchell's estate, but after there was no longer any claimant in this case of the Tuley debt, it having been paid, the accounts were reërranged among the parties claiming under the will—a matter to which no party in that case could offer any objection.

Judge Lee, delivering the unanimous opinion of this court. in the cases of *Tarr v. Ravenscroft*, and *Tarr v. Hendricks*, 12 Gratt. 642, says: "The doctrine of contribution among sureties is founded rather on principles of equity and natural justice than upon any notion of mutual contract, express or implied." Citing *Dering v. Earl of Winchelsea*, 1 Cox R. 318.; *Craythorne v. Scruburne*, 14 Ves. R. 160; and Lord Redesdale in *Stirling v. Forrester*, 3 Bright's R. 575, 590. See also *Knight v. Hughes*, 3 Car. & Payne 467, *Scrain v. Wall*, 1 Ch. Rep. 80; 1 Story's Equity Jur. § 499; Theobald on Prin. and Sur. ch. 11, § 283, p. 267.

The object of the whole doctrine is equity, and equality of burdens is equity. See also *Blow v. Maynard*, 2 Leigh, 29. The question whether this burden should fall on Mrs. Mitchell's estate has, it seems, never been really litigated in any case, and if it had been in the case of *Xaupi v. Mitchell's ex'or*, it could not be held conclusive of the rights of Strother's estate not before the court, and not in any degree represented in that case.

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It follows that the decrees complained of must be reversed and annulled, and the cause remanded, to allow Strother's administrator and the other appellants a day in court to litigate this to them very important question.

DECREES REVERSED.

Richmond.

STROTHER'S ADMINISTRATOR v. XAUPI AND ALS.

JANUARY 29th, 1885.

1. PRACTICE IN CHANCERY—*Rehearing—Case at Bar.*—T. held J.'s bond dated 1860, whereon M. and S. were sureties. In 1866, after death of the sureties, judgment was had on the bond against J. Under M.'s will J. is a legatee, and assigns to T. his legacy to pay the bond. In 1879, X., another legatee of M., sues for a settlement of the estate, and T. is made a party, and receives payment of the bond out of J.'s interest in the estate. In 1882, the master files a supplemental report, founded on a letter of J.'s dated 1880, and showing that J. had received from M., his mother, *before* she made her will, an advancement, which satisfied his legacy. In 1882, a decree was entered confirming this report. In 1883, M.'s executor sues administrator of S. claiming that the estate of the latter should refund half of the sum paid by M.'s estate to satisfy the bond, and based the claim on the said report so confirmed. In the suit of *X. v. M.'s executor*, in 1884, the administrator of S. asked leave to file petition to rehear and annul decree confirming said report.

HELD:

1. Decree of 1882, confirming supplemental report, was not binding on S.'s estate, it being rendered in a suit wherein said estate was unrepresented.
2. Letter containing admissions of assignor after the assignment, was not evidence, and no basis for the report.
3. Leave should have been given to file the petition.

Argued at Staunton, but decided at Richmond.

Appeal from decree of the circuit court of Clarke county, rendered May 19th, 1884, in the chancery cause of Edward J. Xaupi and wife against Mary Mitchell's executor and others. The facts of this case are the same as those in the foregoing case of Strother's administrator against Mitchell's executor,

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with the addition that after the institution of the said suit, in May 1884, the administrator of J. T. Strother, asked leave of the said circuit court in this cause, to file a petition and to become a party thereto, and to have the decree, which confirmed the report of Master Moore, reheard and annulled, and to resettle the accounts of J. T. Thomas, executor of Mary Mitchell. But the circuit court refused the leave and rejected the petition. From which decree, the administrator of J. T. Strother obtained an appeal to this court.

T. W. Harrison, for the appellant.

Barton & Boyd, for the appellees.

LACY, J., delivered the opinion of the court.

The record in this case, shows that after the institution of the suit against him, by Mitchell's executor, as set forth in the suit of *Strother's administrator v. Mitchell's executor*, Strother's administrator, moved the circuit court of Clarke county, for leave to file a petition presented to the court, that he might be permitted to come into this suit, and defend his rights herein; that he had no notice whatever of this suit until the institution of the suit against him in the circuit court of Frederick county; that it was then claimed that he was concluded by this suit, although he had been in no wise connected with it; that he did not know he was in any way interested in this suit until he was notified by the suit against him in Frederick county, based upon the results of this; that having been held to be interested in this suit, he prayed to be allowed to come in by petition, and defend his rights herein; that there were material errors in this record; that if he was to be bound by the proceedings, he desired to be heard; that the decree herein against him was based upon insufficient evidence, was indeed, without proof of any sort; that the letter of Joseph T.

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Mitchell, upon which the decree was based, was neither filed nor exhibited, that it was not evidence against him, as he was not a party to the suit, and was not evidence for any purpose, because the writer had no interest in the subject, having long before the date of the letter, assigned all his interest to Mrs. Tuley, who was seeking in that suit to subject it to the payment of her debt. This, and much more was set forth in the said petition. But the circuit court refused to allow the petition to be filed, and decreed that it be rejected. From this decree Strother's administrator appealed to this Court.

The circuit court of Clarke erred in rejecting this petition. Strother's administrator was deeply concerned in the final result of the cause, and all the proceedings up to that point had been had when he was not before the court.

The decision of the court had been based, so far as it concerned Strother, upon a letter of Jos. T. Mitchell, written many years after he had assigned his interest to a third person. It was not offered in evidence to affect the rights of his assignee; for, so long as Mrs. Tuley was in the cause asserting her right to the interest of Jos. T. Mitchell in his mother's estate, by virtue of his assignment to her, it was not produced. After Mrs. Tuley had been paid her debt, as the assignee of Jos. T. Mitchell, *then it was produced out of the possession of one of the parties to show that Jos. T. Mitchell had no interest in the estate of his mother, and it was then made the basis for the action of the court in reforming the accounts settled in the cause, the only effect of which was to fasten a liability on Strother's administrator for the benefit of the parties thus producing and using it among themselves.*

Where had this letter, addressed to the wife of the executor of Mrs. Mitchell, as the commissioner says *he supposes it was*, been all the time before that? If produced before Mrs. Tuley was paid, as the assignee of Jos. T. Mitchell, and then relied on, as it has been since, it would have shown that Mrs. Tuley took nothing by her assignment from Jos. T. Mitchell, because

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he had nothing to assign. Was this very important letter, as it has been held to be, held back by accident, mistake, or negligence? The husband of the person to whom it was *supposed* by the commissioner to be addressed, because it began "My dear Belinda," and ended "Your affectionate brother," and who informed us that he was a lawyer practicing his profession in Philadelphia, cannot be presumed to have held it in ignorance of its value to him, if he could make it available.

But it is of no practical value to speculate upon the matter. The history of the letter is subject to proof. It did not prove itself; and, if it had, it did not affect the rights of Strother's administrator, who was not a party to the cause.

The general rule admitting the declarations of a party to the record in evidence applies to all cases where the party has any interest in the suit. But when the party has no interest in the matter, his name being used by one to whom he has assigned all his interest in the subject of the suit, he cannot be permitted by his acts or his admissions to disparage the title of his assignee or vendee. That chancery will always protect the assignee is very certain, says Mr. Greenleaf.

The letter could not have been used to defeat the claim of Mrs. Tuley as assignee, and it cannot be used to affect the rights of Strother's administrator without admitting him an opportunity to show cause against it. For these, and the reasons set forth in the opinion in the case of *Strother v. Mitchell*, we think the circuit court erred in rejecting the petition of Strother's administrator, and the same must be reversed and annulled, and the cause remanded to the said circuit court of Clarke county for further proceedings to be had therein.

DECREE REVERSED.

Richmond.

PARSONS v. THE COMMONWEALTH.

JANUARY 29th, 1885.

1. APPELLATE COURT—*Reversible Error*.—P., a creditor of the Commonwealth, filed in the circuit court of the city of Richmond, under Code of 1873, chapter 44, his petition against the Commonwealth and the Auditor of Public Accounts, praying judgment against her for the amount of his debt, and a rule was awarded summoning them to answer the petition. Later, before appearance for either of them, the court, *ex mero motu*, dismissed the petition against the Commonwealth. On error to this court:

HELD:

1. Under statute, the Commonwealth of Virginia may be sued for any debt or claim due. *Higginbotham v. Commonwealth*, 25 Gratt. 627.
2. But, though the order dismissing the petition against the Commonwealth, may have been unnecessary, yet as it did not affect the petitioner's right or remedy, it was not an error for which this court will reverse the order.

Error to judgment of circuit court of the city of Richmond, rendered December 24th, 1884, dismissing as to the Commonwealth of Virginia, the petition of Edwin Parsons against her and Morton Marye, as Auditor of Public Accounts of the State of Virginia.

Opinion states the case.

Richard L. Maury, for the plaintiff in error.

There can be no doubt that this statute certainly authorizes and permits suits to be brought against the State. Such was

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its purpose, its language; especially section 6, shows clearly that judgments and decrees against the State in suits brought thereunder, are contemplated and provided for, and this court has unanimously so decided. *Higginbotham v. Commonwealth*, 25 Gratt. 636.

It would therefore seem to be equally certain that the Commonwealth must be named a defendant, otherwise the petition would be demurrable, since it would be found to state a claim upon and ask relief from a person who was not named a party.

It may be true that as no method of serving process upon the Commonwealth is expressly named in the act, that service upon the Auditor is service upon her, although this idea does not seem to harmonize with the requirement of section 2, "that the Auditor shall be named a defendant," for if it had been intended that he should thus represent the State, the language would more properly have been, "that the Auditor shall be named *the* defendant." Manifestly it was contemplated that there would be more than a single defendant to such petitions.

But even if this be so, and if it be true that service upon the Auditor is service upon the Commonwealth, that can be no reason why the Commonwealth, thus to be served with process, should not be named a defendant. Unless the Commonwealth is named a defendant, the suit certainly cannot be said to have been brought against her; and yet the very object of the statute is to provide a mode by which this shall be done.

It was, therefore, entirely premature and irregular in the learned judge to undertake to decide the matter at this early stage of the case. It would have been quite time enough to consider how process should be properly served when objection had been taken to the mode of service adopted, and if such service were found to be improper, then to dismiss the petition: but to dismiss the petition as against the Commonwealth, which was filed against her by express authority from the State, at the very threshold of the court, was surely error.

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Attorney-General F. S. Blair, for the defendant in error.

The order of the court dismissing the said petition, was right, because it was a suit directly against the Commonwealth of Virginia as well as against her auditor. Since the decision of the Supreme Court of the United States in the case of *Antoni v. Greenhow*, 107 U. S. R. 769, it can hardly be asserted that a suit can be brought against a State, whatever construction may have been placed on *Higginbotham's case*, 25 Gratt. 627.

There is nothing to show that that case was a suit directly against the State in the circuit court, or, if the State was sued directly, the syllabus shows that she was sued under a particular statute.

From page 680 of 25th Gratt., at bottom of page, it would seem that the suit was directly against the Second Auditor, and that it was only called *Higginbotham v. The Commonwealth*, when it reached the Court of Appeals.

In conclusion, a suit cannot be brought against the State of Virginia, in a forum in which she has not consented to be sued as has been done in this case; and I rely upon *Antoni v. Greenhow*, *Louisiana v. Jermel*, *Elliott v. Wilks*, decided by the Supreme Court of the United States in the spring of 1888.

The Code of 1873, chapter 44, shows that the State must not be sued in person, but the proceeding must be against her officers named in that chapter.

FAUNTLEROY, J., delivered the opinion of the court.

This is an appeal from and *supersedes* to a decretal order of the circuit court of Richmond city, entered December 24th, 1884, in a suit therein depending between the appellant, Edwin Parsons, and the Commonwealth of Virginia. On the 22nd December, 1884, Edwin Parsons, the Appellant, filed his petition in the said circuit court of the city of Richmond,

in which he averred, that the Commonwealth of Virginia is indebted to him in the sum of \$24,000; for which amount he holds her past due obligations, being 800 of her coupons, for \$30 each, cut from bonds of the Commonwealth, issued under the Act of the General Assembly, dated March 30th, 1871; that the Commonwealth had refused to pay them, and therefore prayed judgment against it for that amount, and interest according to law; and that a summons issue requiring the said Commonwealth of Virginia, and Morton Marye, Auditor of the Commonwealth of Virginia, to appear and answer the said petition, and show cause, if any, they, or either of them, can, why such judgment should not be entered as prayed for, etc.

In response to this petition, the said circuit court, on the 22d December, 1884, issued "a summons to the Commonwealth of Virginia, and to Morton Marye, Auditor of the Commonwealth of Virginia, to appear, on the 1st Monday of February, 1885, and answer said petition, and show cause, if any he can, why the prayer thereof should not be granted, and why judgment should not be entered in his behalf, against the Commonwealth of Virginia, for the sum of \$24,000, with interest as demanded."

On the 24th day of December, 1884, before any appearance for any of the defendants, the court, of its own motion, "ordered, that the order herein entered upon the 22d of December, 1884, be set aside; and, upon consideration of the petition, heretofore filed, this court being without jurisdiction to entertain any suit against the Commonwealth of Virginia, it is ordered that the said petition, as to the Commonwealth of Virginia, be dismissed. And, it is further "ordered that Morton Marye, Auditor of the Commonwealth of Virginia, do file his answer to said petition, on or before the first Monday of February, 1885, and show cause, if any he can, why the prayer of the petition should not be granted."

From this last mentioned order in the cause by the circuit court, this appeal is taken. The question presented by the record, seems to be more of mere form than of importance;

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for while the order complained of, does amend the first order, by dismissing the petition as against the Commonwealth, *eo nomine*, as a party; yet it expressly retains the petition as against the Auditor, Marye, and summons him to answer and show cause why the prayer of the petition shall not be granted and judgment against the Commonwealth entered for the amount claimed. And this, according to the ruling of this court in *Higginbotham v. The Commonwealth*, 25 Gratt. 627, fixes the amenability of the State to the judgment of the court.

On page 637 of 25 Gratt., Judge Bouldin, for the court, in *Higginbotham v. The Commonwealth*, *supra*, said "My opinion is, that under the statutes of the State, she is liable to be sued in this case, by petition against the Auditor, and that judgment should have been rendered against her. I do not mean to intimate that a State can be sued, in any case, either by her own citizens, or by others, in her own courts, without her authority and against her consent. But it has ever been the cherished policy of Virginia, to allow to her citizens and others the largest liberty of suit against herself; and there never has been a moment since October 1778, (but two years and three months after she became an independent State,) that all persons have not enjoyed this right by express statute."

The petition filed in this case, is under the 44th chapter of the Code of 1873, whose sections from 1 to 6, inclusive, set out the mode of procedure to recover claims against the State; and the order of the circuit court of the city of Richmond, complained of, is a mere matter of pleading or procedure; for it still entertains the cause as it is made in the petition, and upon proper and sufficient proofs, judgment can be rendered against the Commonwealth for the debt claimed. The State has, by statute, allowed herself to be sued in her own court, to-wit: the circuit court of the city of Richmond; but this, *sub modo*, "in every such case the said Auditor of Public Accounts, shall be a defendant. He shall file an answer stating the objections to the claim; and the cause shall be heard, without any unnece-

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essary delay, upon the petition, or bill, and answer and evidence."—Code of 1873, chapter 44, section 2.

The order of the circuit court in this case, may have been unnecessary, or, under the first and amended order in the procedure, the judgment of the court would have been exactly the same; yet it has not affected the right or the remedy of the appellant, and he has no cause for appeal. The judgment or order complained of is affirmed.

JUDGMENT AFFIRMED.

Richmond.

HATCHER v. HATCHER.

JANUARY 29th, 1885.

1. **WILLS—Codicils—Republication.**—Upon a paper, whereon there was writing dated 1858, and purporting to dispose of H.'s property, but without signature or attestation, H., in 1864, wrote another instrument, with the caption "Codicil to the above will," which instrument was duly executed and attested.

HELD:

The execution of the codicil effects the republication of the will, and brings the latter down to the date of the codicil, so that both speak as of the same date. *Corr v. Porter*, 33 Gratt. 278.

2. **IDEM—Rules of construction.**—See opinion for some of these rules.
3. **IDEM—Construction—Case here.**—Testator had five daughters. To each of the three married ones, in his lifetime, he gave two slaves, and confirmed the gift by will of 1858, by which he gave each of his two unmarried daughters, L. and F, two slaves, provided for equal distribution of his other estate, and added: "If anything should happen to the negroes named for L. and F. before they get fully in possession of them, I wish said loss made up to each of them, as I wish to make all my children equal in the division of my estate." By codicil of 1864 he adds: "I wish, at the close of the war, the property not already devised, with the exception of the land and negroes, to be equally divided among my children. The negroes to be hired out, with the exception of Nelly and Henry, who I wish to remain on the farm, and aid in supporting my daughters L. and F. while unmarried, it being my wish that they shall have the farm and the two negroes above named to support them on it, while unmarried, till the year 1871."

HELD:

1. The loss of the slaves, by emancipation, is within the intention of the testator, and L. and F. are entitled to be compensated for the loss.
2. L. and F. are entitled to a support, and nothing more, while unmarried, from the farm.

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Argued at Wytheville, but decided at Richmond.

Appeal from decree of circuit court of Bedford county, entered 4th June, 1883, in the chancery cause wherein Robert H. Jeter, executor of Julius H. Hatcher, deceased, and others were defendants, and James W. Hatcher and Laura, his wife, and Benjamin Noel and Florella, his wife, were complainants. The object of the suit was—first, to hold the estate of the testator, Julius H. Hatcher, deceased, bound to indemnify the plaintiffs for the loss of the slaves which had been specifically bequeathed to them, it being alleged that these slaves had never come to their possession under the will of their father, but were made free by the result of the war, and that this loss, by emancipation, was a loss provided against by their father's will; and second, to have paid to them the value of the crops raised on the farm for the year 1865, which crops they claimed to be entitled to under the codicil.

The cause being heard, the circuit court decreed in favor of the plaintiffs on the first proposition, and from the decree the executor of Julius H. Hatcher obtained an appeal to this court.

Opinion states the facts.

Burks & Burks, for the appellants.

E. P. Goggin, for the appellees.

HINTON, J., delivered the opinion of the court.

The question in this case arises upon the construction of the second clause of article 6th of the will of Julius H. Hatcher, deceased, which is in the following words:

“Also if anything should happen to the negroes named for Laura and Florella before they get fully in possession of them I wish said loss made up to each of them as I wish to make all my children equal in the division of my estate. I wish no difference to be made among them.”

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Now the first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. *Smith v. Bell*, 6 Pet. 75. But this intention must be collected from the words of the will, for the object of construction is not to ascertain the presumed or supposed, but the expressed intention of the testator, that is, the meaning, which the words of the will, correctly interpreted, convey. The expressed meaning being, in wills, as in other written instruments, in legal contemplation, equivalent to the intention. *Shore v. Wilson*, 9 Cl. & F. 525; *Wootten v. Redd*, 12 Gratt. 205. And in order the better to comprehend the scheme which the testator had in his mind for the disposition of his estate, the judicial expositor is permitted to place himself, figuratively speaking, in the very shoes of the person, whose will he is called on to construe, and with the aid of such extrinsic evidence as is admissible for the purpose, possess himself of the condition of the testator and his family and of such surrounding facts and circumstances as may be reasonably supposed to have influenced him in the disposition of his property. *Wootten v. Redd*, 12 Gratt. 205; *Hoe v. Hoe*, 13 Gratt. 245; *Williamson v. Coulter*, 14 Gratt. 398. With the lights thus afforded him, he is prepared as well as it is possible for him to be, without letting in evidence of the testator's actual intention as contradistinguished from his written meaning, to declare, upon a careful examination and comparison of all parts of the will, what is the meaning of the words which the testator has seen fit to employ. Now here, the testator was a man possessed of a fair estate; with five daughters, for all of whom he desired to provide alike. He had already given to each of the three, who were married, two slaves; and of these the daughters had been in possession for several years. In March, 1858, he gives in articles 1, 2 and 3 of an instrument in writing, which is neither signed nor attested however, to each of these three married daughters, the same slaves of which he had put them in posses-

sion; and by articles 4 and 5 of the same instrument he gives as follows:

"Article 4th. I give to my daughter Laura [now Mrs. Hatcher, and one of the appellees], and the lawful heirs of her body Ellen and her increase and boy Ramsey, also the balance of property that may fall to her after my death in an equal division of the same.

"Article 5th. I give unto my daughter Florella [now Mrs. Noell, and one of the appellees], and the lawful heirs of her body, Charlotte and her increase and boy Jimmy and the balance of property that may fall to her after my death in an equal division of the same."

And then by the first clause of article 6th he directs: "Should it not be done in my lifetime I wish given after my death to each of my daughters, Laura and Florella a good horse, bridle, saddle, cow and calf, bed and furniture, all of good quality, say No. 1." He had by the previous articles of the will given chattel property of the same kind to each of the married daughters. In September, 1864, he wrote upon the same paper another instrument, with the caption "Codicil to the above Will," and this instrument is duly executed and attested. The first and second articles of this codicil are as follows:

"Article 1st. I wish all my daughters jointly to enjoy the control and management of my property not devised at my death for their maintenance as long as the war lasts, provided they make my present residence their home. If any of them think they can make better arrangements they are at liberty to do so, and take the property I have already devised them. Out of the proceeds of the farm, &c., I wish Laura and Florella to be allowed money to furnish necessary apparel. I also wish at the close of the war the property not already devised with the exception of the land and negroes, to be disposed of and divided equally among all my children then living and the heirs of such as may be dead. The negroes to be hired out with the exception of Nelly and Henry who I wish to remain on the

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farm to aid in supporting my daughters Laura and Florella while unmarried, it being my wish that they shall have the farm and two negroes above-named to support them on it while unmarried till the year 1871. That is, I wish them to have my home as theirs for a support if unmarried and the two negroes named above till 1871. But they are at liberty to make other arrangements if they think best while one or both remains unmarried. If either of them marry, this provision for them while unmarried ceases.

“Article 2nd. After January 1st, 1871, I wish all my property of every sort and kind, not already devised, to be equally divided among all my children then living, and the lawful heirs of such as may be dead.”

The testator died within a week after the execution of this paper; and the slaves were emancipated as one of the results of the war. And the appellees, Laura and Florella, never having acquired possession of the slaves bequeathed to them, it is for the court to determine whether they are entitled to be compensated for the loss thus sustained or not.

The codicil, it is admitted, operates as a republication of the will, and the effect of the republication is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time. *Corr v. Porter*, 33 Gratt. 283. 1 Jar. on Wills (Bigelow's ed.), section 4, 114 *et seq.* 1 Redfield on Wills, 287 *et seq.* And in this case, as there is nothing in the language of the will to indicate a contrary intention it must be held to speak from the death of the testator. Code 1873, chapter 118, section 11. *Cutfield v. Bostwick*, 21 Conn. 550. But as this is a matter of little consequence either way, I lay no stress upon it.

In this case we can have no difficulty in discovering what was the intention of the testator, for it is not left to implication, but is expressed in nearly every article of both will and codicil. He clearly intended to make them all equal in the distribution

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of his estate, and *his mode* of doing this was to give to each of his children, amongst various other kinds of chattel property, two slaves. He had already placed the married daughters in possession of the slaves which he designed for them, and his purpose was to put his unmarried daughters in possession of an equal number, and failing in this to give them an equivalent in money. It may be that he did not contemplate the emancipation of the negroes as the result of the war as *one* of the means by which his purpose might be defeated, or, it may be that although he did contemplate this contingency as one of the means by which his purpose might be defeated, he yet chose, out of abundance of caution, to say what disposition he desired made of them in the event of their not being emancipated. His conduct in the premises is certainly susceptible of both constructions. For whilst the direction to hire out the negroes until the year 1871, does show, that he contemplated, even at that late period of the conflict, as a probable contingency, that the Confederate cause might ultimately prove successful; it does not show, however, that he did not contemplate the downfall of the Confederacy and the consequent abolition of slavery, as a possible contingency. But, however this may be, it is certainly clear that the testator contemplated that something might happen by which slaves might be wholly lost to his two unmarried daughters, and it is equally clear that, in that event, he intended that these children should be paid the value of the slaves. His purpose therefore was in certain contingencies to require that these children should be indemnified out of his estate to the extent of the full value of these slaves, and this was the way in which he proposed to equalize the distribution of his estate amongst his children, and it is the only way which he has marked out for that purpose. The question therefore is, can this intention, under the rules of construction applicable to wills, be made to prevail? We think it can.

It is argued by the learned counsel for the appellants with great force and ingenuity, and I was for a long while of the

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same opinion, that the language of the will is not "if anything should happen" before the legatees got possession, whereby the slaves were lost to them, but it is "if anything should happen to the negroes;" and that this language naturally implies some accident or casualty, such as personal injury, death or disease, by which the value of the property is either destroyed or seriously impaired. Admitting that such is the usual import of these words, we still think that it is allowable to give to them such a construction as will carry out the primary intention of the testator.

In *Key v. Key*, 4 D., M. & G. 73, Sir Knight Bruce, L. J. said: "In common with all men, I must acknowledge there are many cases upon the construction of documents, in which the spirit is strong enough to overcome the letter; cases in which it is impossible upon a careful perusal of the instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly."

In *Grey v. Pearson*, 6 H. L. Cas. 61, Lord St. Leonards said: "Nobody is more disposed than I am to abide by clear words, and to give to them their natural and grammatical meaning; but I never did and never can come to the conclusion, that the words of a will cannot admit of modification according to the real intention of the testator, as you find it from other expressions, or from the whole context of the will. It is difficult to lay down, says he, any abstract rule upon the subject, but where I find the intention, and I find words pointing out the intention, and that if I give to the words their simple meaning according to grammar and according to their *prima facie* import, I defeat the intention,—I hold that I am bound, by every rule both of law and equity, to see whether I cannot give to

them by natural construction, an import which will effectuate and not defeat the intention."

And in *Abbott v. Middleton*, 7 H. L. Cas. 94, the same great judge said: "But if, upon the whole frame of the will, I am satisfied of what was his general intention, I start with that general intention. It will not enable me to alter words; but, having ascertained the intention, then I have to ask, whether I can or cannot so construe the words actually used as to carry out the intention."

Now here we are all clearly satisfied that the general scheme or intention of the testator was to distribute in kind certain different species of chattel property among his children, and then to divide the remainder of his estate equally amongst them. But it was also part and parcel of this scheme, that if these unmarried daughters should fail to get full possession of the slaves intended for them, that they should be indemnified for any loss they might thus sustain; and being so satisfied, the words "if anything should happen to the negroes named for Laura and Florella before they get fully in possession of them," &c., must be held to include a loss resulting from the contingency which has happened. By doing so we certainly effectuate the general intention and do no great violence to the literal meaning of the words.

Upon the point that Laura and Florella were entitled to the proceeds of all the crops for the year 1865 we agree with the learned judge who decided this cause, that they were simply entitled to a support.

The decree of the circuit court of Bedford county must be affirmed.

DECREE AFFIRMED.

Richmond.

DUNNINGTON v. FORD.

FEBRUARY 5th, 1885.

1. STATE—*Suits against*.—The State can only be sued by its consent. When a remedy by suit against the State, or any of its officials is provided, those seeking to avail of its benefits must follow its provisions with exact strictness.
2. IDEM—*Idem*—*Discrepancy fatal*.—Under act of 26th January, 1882, amended 13th March, 1884, Acts 1883-'84, page 527, the suit is required to be commenced by a petition filed at rules, upon which a summons shall be issued to the collecting officer, and regularly matured like any other action at law, and the coupons tendered shall be filed with the petition. A suit brought in any other way is unlawfully instituted, and must be dismissed.

Error to judgment of corporation court of Lynchburg, rendered August 4th, 1884, in the suit of James A. Ford, plaintiff, against V. G. Dunnington, treasurer of the city of Lynchburg, ordering, for reasons going to the merits, the Auditor of Public Accounts to issue his proper warrant for the payment to said Ford of the sum of \$526.05 as of June 7th, 1884, which was wrongfully collected, upon his delivering to the Auditor for cancellation, the coupons offered in evidence.

Opinion states the case.

Attorney-General F. S. Blair, for the plaintiff in error.

Kirkpatrick & Blackford, for the defendant in error,

LACY, J., delivered the opinion of the court.

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This case is brought to this court under the act of the General Assembly of March 12th, 1884, giving appeals to this court as of right to the Commonwealth in all cases arising under the acts of January 14th and January 26th, 1882, entitled respectively an act to provide for the more efficient collection of the revenue, &c.

The amount involved in this controversy is \$526.05.

This suit is brought under the provisions of the act of January 26th, 1882, as amended by the act of March 13th, 1884. Acts 1883-'84, page 527.

For reasons commending themselves to the legislative mind, the proceedings authorized by the said acts were provided by the legislature for the benefit of her creditors holding genuine coupons detached from genuine bonds of the State, which were receivable for taxes due the State, and for the protection of the State against claims of the holders of alleged fraudulent coupons. The State can be sued only by her consent, and when a remedy by suit against the State, or any of the officers of the State, is provided, those creditors who seek to avail themselves of its benefits must be content to follow its provision with exact strictness—there is no authority to sue the State, except as provided by the law. And it is the duty of the courts to see to it that the legislative will is not disregarded, and that when proceedings are prescribed by the act, they be followed according to its terms.

It would be difficult to draw a line which would mark the distinction between material and immaterial departures from the prescribed methods, and it should not be presumed that any prescription was made which was not regarded as essential by the legislature.

The legislature has provided in the act in question, giving this remedy—that the suit contemplated by this act shall be commenced by a petition filed at rules, upon which a summons shall be issued to the collecting officer—that the suit shall be

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regularly matured like other actions at law, and the coupons tendered shall be filed with the petition.

This proceeding was not followed in this case. The suit was not commenced by petition filed at rules, but by a summons sued out of the clerk's office, and the petition was afterwards filed.

It is no answer to this objection to say that one way was as good as the other, or that the form adopted to commence the proceedings was a substantial compliance with the law, or more convenient to the suitor.

Such an apology would not avail if an action of ejectment should be so brought, or an action of unlawful entry and detainer should be brought by a summons to answer a complaint to be filed at rules. It avails nothing in this case—the suit is not brought as required by law. There is no lawful warrant for the suit as brought, and being instituted without lawful authority, it should have been dismissed by the corporation court. And the said court erred in overruling the motion of the defendant to that end. And the judgment of the said corporation court must be reversed and annulled, and the petition of the plaintiff be dismissed.

FAUNTLEROY, J., and RICHARDSON, J., dissented.

JUDGMENT REVERSED.

Richmond.

WHITE V. CAMPBELL.

FEBRUARY 5th, 1885.

1. EQUITY JURISDICTION AND RELIEF—*Parol evidence—Correcting mistakes.*—There can be no question as to the power and duty of courts of equity to reform a written instrument between living parties and for a valuable consideration, on account of a mistake of the draftsman, though proven by parol evidence; but not where the party seeking to reform the writing is a mere volunteer, and the other party is dead.
2. IDEM—*Case at bar.*—Where C. paid off a judgment against W. for the expressed benefit of M., who was a mere volunteer, and directed the draftsman to draw the assignment for M.'s benefit; and by mistake of the draftsman the assignment was drawn directly and plainly to C., who retained the writing until his death without any complaint of the mistake; in litigation between C.'s administrator and M. as to the ownership of said judgment.

HELD:

A court of equity cannot reform the plainly-written assignment in favor of M., a volunteer, and give effect to C.'s intentions as proved by parol evidence.

Appeal from decree of circuit court of Caroline county, entered March 14th, 1882, in the chancery cause therein pending, wherein W. B. H. Campbell, administrator of J. P. H. Campbell, was complainant, and J. J. White, Walter S. Wright, executor of Ann J. Wright, W. S. Chandler, Jos. A. Chandler, John Washington, A. B. Chandler, Wm. G. Miller, and Emma E., his wife, Ann J. Wigglesworth, and others, were defendants.

Opinion states the case.

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Washington & Chandler and Sands, Leake & Carter, for the appellant.

Geo. P. Haw, for the appellees.

FAUNTLEROY, J., delivered the opinion of the court.

The bill is filed by the administrator of Joseph P. H. Campbell to subject the lands of James J. White, the husband of appellant, to the payment of certain debts alleged to be due to the estate of his intestate. The said James J. White, being indebted to sundry persons, and desirous to secure the payment of his said indebtedness, did, on the 16th of November, 1874, convey in trust to John Washington and Joseph P. H. Campbell a certain farm of 630 acres of land in Caroline county, Virginia, to secure the debts therein enumerated; among which was a debt of \$1,500 due to Polly M. Marshall, with interest at eight per centum per annum from October 16th, 1874—subject to the payment of two years interest endorsed thereon.

After the execution and recordation of this aforesaid deed of trust, to-wit: on the 2nd day of January 1875, one W. G. Miller and E. H. Miller his wife, who was E. H. Wigglesworth, and Ann W. Wigglesworth obtained, in the circuit court of Spotsylvania county, a decree against H. B. White and the said James J. White, in a chancery suit therein depending, under the style of *Wigglesworth v. Wigglesworth*, for the sum of \$815.67 with interest on \$671.07 from the 4th February 1869, and on \$144.60 from April 1st 1870 till paid, and their costs; and also for the payment to Ann W. Wigglesworth of a like sum, with like interest and costs, to be paid by the same parties.

Shortly after the rendition of this decree, the aforesaid William G. Miller, who had married Miss E. H. Wigglesworth, acting for himself and wife, and for his wife's sister, Miss Ann W. Wigglesworth, they being the owners of the said decree,

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wrote a letter to the said James J. White offering to accept fifty per cent., or one half, of the whole sum decreed, and to release the said James J. White, upon the payment of the said fifty per centum, from all responsibility or liability under the said decree. James J. White, who was only surety for this debt of H. B. White as guardian for the Wigglesworths, though fully appreciating the friendly motives expressed by this offer, as personal to him and his family, was wholly unable to accept or avail of the offer, as he had no money, and no property except what was already embraced in the deed of trust to secure his own creditors. After the receipt of this letter from Miller, J. P. H. Campbell visited James J. White's house, as he was in the habit of doing, upon terms of the closest intimacy and affection for the said James J. White, and his sister, Mrs. White, who was, and had been for years, a helpless and hopeless invalid, confined to her chamber and unable to see anyone but her family and immediate friends, and expressed his anxiety about the Wigglesworth decree, and asked James J. White what he had done about it. White told him that he had done nothing; and was wholly unable to do anything; and intended to do nothing; and handed to him the letter from Wm. G. Miller. Campbell read the letter, and, remarking, this matter must be settled and ended; a sale here will kill Margaret, (meaning his sister and White's wife) he put Miller's letter in his pocket. Early the next morning he left, saying he was going to see John Washington. He did confer with John Washington, who was a lawyer, and his friend and adviser, and he paid the decree to Wm. G. Miller, by giving his negotiable note, with John Washington as his endorser, at ninety days from the date of the decree for fifty per cent. of the decree. And this, William G. Miller, acting for himself and wife and sister-in-law, Ann W. Wigglesworth, accepted in full payment and discharge of the decree. William G. Miller obtained from H. B. White, the principal debtor, his notes endorsed by John White, his son, for the whole amount of the debt, and passed them over to

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Campbell, who took them in full satisfaction of the debt evidenced by the Wigglesworth decree, refusing the offer of James J. White to endorse the notes so as to make himself responsible for their payment—saying that he would take the notes in satisfaction of the Miller debt, which he had paid, and make what he could out of the principal debtor, H. B. White. James J. White did not, at any time, request Campbell to pay the debt, or any part thereof; nor did he promise Campbell, at any time, to pay him the same, or any part thereof:—being wholly unable to meet such a promise.

After the execution of the deed of trust of November 16th 1874, by James J. White to secure his own creditors, and among them a debt due to Polly M. Marshall for \$1,500 bearing eight per cent. interest, Polly M. Marshall brought suit on the bond, evidencing the said debt, and obtained a judgment, and sued out execution, which was in the sheriff's hands.

Joseph P. H. Campbell, who was a bachelor without family, advanced in years and possessed of considerable means, actuated by the same tender solicitude for the peace and comfort of his invalid sister, Mrs. White, and his brother-in-law, James J. White, whose home and only shelter was threatened, by the execution of this judgment, again came forward and expressed his wish and purpose to pay off and satisfy the debt due to Mrs. Polly M. Marshall, not only for the momentary or temporary relief, but for the ultimate use and benefit of his sister Mrs. White. He consulted Mr. E. C. Moncure, the attorney for Mrs. Marshall who had obtained the judgment, as to the mode of effecting this object and declared intent. Campbell did pay off and satisfy the debt to Mrs. Marshall (except about \$220 of it, which was paid by James J. White) and told Mr. Moncure to draw the assignment of the judgment, after it should be finally and fully paid off, in the agreed instalments, from time to time, for the benefit of his sister, Mrs. White. Moncure, however, who was Mrs. Marshall's attorney, by some aberration of mind or memory, drew the assignment simply to J. P. H. Campbell,

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and not, as Campbell had instructed him to do, for the benefit of his sister, Mrs. White. Soon after this Campbell died, in 1876, without a will; and his administrator filed the bill in this cause seeking to subject the land of James J. White to the payment of the Wigglesworth-Miller decree, and the Polly M. Marshall assigned judgment, as belonging in law and equity to the estate of his intestate, J. P. H. Campbell.

The answers of the defendants, Margaret A. White, James J. White, Joseph A. Chandler, John Washington, and Washington and Chandler, are filed, and they deny the material allegations of the bill; the answers of James J. White and of Margaret A. White emphatically denying and resisting all liability, either legal or equitable, for the Wigglesworth-Miller decree, or for the Marshall judgment, to the estate of J. P. H. Campbell; and alleging a mistaken and defective execution of the assignment, by the draftsman thereof, contrary to the intent and positive instructions of J. P. H. Campbell; and praying the court to reform the defective assignment, and to decree that the Polly Marshall debt was intended for her, and is her property.

An order of reference to a master commissioner of the court was entered directing, among other inquiries, whether or not the said J. P. H. Campbell paid off or discharged the decree entered against H. B. White and James J. White in the chancery suit of *Wigglesworth v. Wigglesworth*, dated January 2d, 1875, or whether he became entitled thereto as against James J. White, either as purchaser thereof or by right of substitution thereto? Whether or not the said W. H. B. Campbell, as administrator of J. P. H. Campbell, is entitled to the judgment of Polly M. Marshall against James J. White, Wm. S. Chandler, J. A. Chandler and John Washington, as against the said James J. White, or whether or not the same belongs to any other person, or has been paid and satisfied, or if anything is due thereunder, how much?

Responsive to this reference, the master commissioner re-

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turned his report, and with it the voluminous evidence upon which it is based, that J. P. H. Campbell paid off and discharged the decree entered against H. B. White and James J. White in the chancery suit of *Wigglesworth v. Wigglesworth* of January 2nd 1875. That he paid it off, voluntarily, for the benefit of his sister, Mrs. White. That J. P. H. Campbell paid off the Polly M. Marshall judgment and took an assignment of it, intending it for the benefit of his sister, Mrs. White;—that he directed the attorney, Moncure, to assign it for the benefit of his sister, Mrs. White; and that the said assignment should have been drawn accordingly for the benefit of Mrs. White.

To this report the plaintiff excepted.

The circuit court by its decree of March 14th, 1882, decided that the plaintiff is not entitled to claim or recover of the defendant, James J. White, anything whatever upon the decree entered by the circuit court of the town of Fredericksburg in the cause of *Wigglesworth v. Wigglesworth*, and referred to and claimed by him in his original bill filed in this cause; and decided that the plaintiff W. H. B. Campbell, administrator of J. P. H. Campbell, is entitled to recover of the said defendant James J. White, the sum of \$1,723.70 (and interest on \$1,310.45, part thereof, from September 1st, 1880, till paid, at the rate of eight per centum per annum), as assignee of the judgment of Polly M. Marshall against James J. White and others. And in default of the payment of this sum of \$1,723.70, with the interest thereon, by James J. White to the plaintiff, in four months from the date of the said decree, the court decreed the land of the said James J. White embraced in the deed of trust to be sold, and the proceeds applied in conformity to the provisions of the deed of trust, and in satisfaction of the decree.

From this decree Margaret A. White, a married woman, and one of the defendants, appeals to this court; and, in her petition, assigns that the circuit court of Caroline erred in decreeing that W. H. B. Campbell, as administrator of J. P. H. Campbell, is entitled to recover of the defendant, James J.

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White, \$1,723.70, and interest on \$1,310.45, at eight per cent., from September 1st 1880, as assignee of the Polly M. Marshall judgment against James J. White and others; but that the same should have been decreed to be paid to Joseph A. Chandler, as trustee for the benefit of petitioner, as prayed for by her, in her answer in this cause.

The counsel for appellee, in his argument, complains of the decree, and contends that the circuit court erred in overruling the exception to the master commissioner's report, and in deciding that the estate of J. P. H. Campbell is not entitled to claim or recover of the defendant, James J. White, anything whatever upon the decree entered in the cause of *Wigglesworth v. Wigglesworth*; but we think there is no error in this. The evidence is overwhelming, clear, and cumulative in the record, that J. P. H. Campbell actuated by the tenderest affection for both James J. White and his invalid sister, Mrs. White, and a volunteer, alert sympathy and solicitude as to the probable effect of the impending decree in the *Wigglesworth* suit upon his sister's peace of mind and even her life itself, paid off and satisfied and discharged that decree, of his own motion and without the knowledge or request of James J. White, whose subsequent proffer to endorse the notes which he had taken for the decree in the settlement with Miller, so as to make him responsible for them, Campbell positively declined. And when inquired of, subsequently, if he did take or intended to take an assignment of the decree, replied that he had not, and would not; that it was not worth the trouble;—that the deed of trust upon White's land would more than cover it any way; that he had paid off the decree to give ease of mind to his sister; and that he did not consider James J. White in any way liable for it; and never intended that any demand should be made on said White for the same, or any part thereof.

The ruling of the circuit court as to this *Wigglesworth* decree is plainly right, and must be affirmed.

The error assigned by the appellant, Margaret A. White, the

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wife of James J. White, is, that the circuit court erred in sustaining the exception of the plaintiff to the report of the commissioner as to the Polly M. Marshall judgment, and in decreeing that W. H. B. Campbell, administrator of J. P. H. Campbell, is entitled to claim and to recover of the defendant, James J. White, the amount of the said judgment by virtue of the assignment of the same from Polly M. Marshall.

The appellant is not the judgment debtor, James J. White, but Mrs. Margaret A. White, his wife, who, being a defendant, filed her answer to the bill filed by the administrator of J. P. H. Campbell, in which she alleged that she is the only sister of J. P. H. Campbell, deceased, and their attachment was mutual and strong; that she has been in delicate health and confined to her chamber for many years; that J. P. H. Campbell always evinced for her the tenderest affection, and that this manifestation has been more strongly marked since her low state of health, and his solicitude for her health and happiness and comfort still more aroused by the pecuniary troubles of her husband; that he repeatedly told her that he had no family and no one beside her whom he cared particularly to provide for, and he would provide for her comfort and support. That he told her he intended to pay off the Marshall judgment for her; and, after it had been paid off in full, he told her that he had the said judgment, and that it was for her use and benefit, and she would have a support. And she charged, in her said answer, that the assignment to her brother, and not to him for her benefit, was a mistake of the draftsman who drew the assignment, and was a defective execution of the express intent and instruction of her brother to Moncure, the lawyer who drew the assignment, to draw it for her use and benefit; that her brother did not know of this defect, and did not intend so to take it; and that he lived and died in the confidence and satisfaction with which he told her he had gotten it, and was holding it for her benefit. She insisted that the Marshall debt was intended for her, and is her property; and she prays the court

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so to decree—and that the deed of trust executed by her husband, James J. White, to secure the payment of this debt be not enforced; but that it be held for her benefit under the deed of trust, as her brother, J. P. H. Campbell, who was one of the trustees named in the deed of trust, believed and repeatedly declared he was holding it for her use and benefit.

The statement of this new affirmative matter in the answer of Mrs. White, is fully and explicitly corroborated by the clear, concurrent and conclusive testimony of numerous unimpeached and unimpeachable witnesses.

The execution to enforce the payment of the Marshall judgment was in the hands of the sheriff; and James J. White, the judgment debtor, and his wife, Margaret A. White, the sister of J. P. H. Campbell, were greatly distressed and afflicted at the impending loss of their home and their all. J. P. H. Campbell, prompted by the same affection, and with the same design, as in the Wigglesworth-Miller decree, went to Moncure, the attorney for Mrs. Marshall, and stated his wish to pay the judgment off, and to arrange it for the benefit of his sister, Mrs. White—and expressly consulted Moncure as to how this his anxious, express purpose could best be effected. Moncure said “take an assignment of it.” The debt was not then paid—it was paid off in instalments; but J. P. H. Campbell instructed Moncure when the debt should be wholly paid off to assign the judgment for the benefit of Mrs. White: telling him then, that his whole scope and design was to give *peace* of mind to his sister: as he did tell sundry other witnesses, in the record, that he had paid the debt off as a gift to his sister—whom he feared would be killed by a sale of the land and the house over her head.

John Washington, like Moncure, a lawyer and a neighbor and confidential friend of J. P. H. Campbell, says that he had frequent conversations with said Campbell about the negotiations and settlement of the Marshall debt, and that Campbell told him that his action in the matter was for the benefit of his

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sister, and that he had paid the judgment off as a gift to her. H. H. George, who held, and had long held, the closest business relations with J. P. H. Campbell, testifies, that the last time Campbell was at his house, a few days only before his death, he told his wife, in his presence, that he had bought the Marshall judgment for the benefit of his sister; and that this he had told him before; and that Campbell further told him that when he purchased the Marshall judgment, he had directed Moncure to assign it for the benefit of his sister; and that Campbell had repeatedly told him that this was his object in buying it, and that he had directed it to be so assigned—and that Campbell believed that it had been so assigned by Moncure, in whom, both as a lawyer and a man, he had full confidence.

All this direct and positive testimony, and much more, in the record, as to the intent, instructions and belief of J. P. H. Campbell that he had bought this judgment and taken the assignment of it for the benefit of his sister, Mrs. White, is wholly uncontradicted by anything in the record; and is opposed only by the legal assignment of the judgment to Campbell as drawn by the attorney for Mrs. Marshall.

But, this clear and unambiguous written instrument is, we are constrained to think, a fatal and insuperable obstacle to prevent a court of equity from interposing its mere reformatory power over contracts to make effectual in Mrs. White, the appellant's behalf, the oft declared beneficent intent of her brother, the intestate, who took the assignment of the judgment which he had paid off, and held it to the hour and event of his death, without having ever complained of the alleged mistake of the draftsman, or saying or doing anything to rectify it.

There can be no question of the power and duty of a court of equity to correct and reform a contract or written instrument, for the proved or admitted mistake of the *draftsman*, between living parties, and for a valuable consideration; and

this, even though the mistake has to be made to appear by *parol* testimony; yet, in this case, Mrs. White is a volunteer; and J. P. H. Campbell, who paid off and took the assignment of the judgment for a valuable consideration, *is dead*; and his personal representative is bound to assert his legal right, as he could himself, undoubtedly do, were he living, against this claim or pretension of Mrs. White.

We have, at great length, and intentionally, in the statement or narrative of this opinion, demonstrated the undeniable truth of the statement, made by the appellant, in her answer filed in this cause, as to the intent and manifested purpose of J. P. H. Campbell to befriend and benefit his sister, Mrs. White, in this payment of the Marshall judgment, as he had done in the payment of the Wigglesworth-Miller decree; but as he took a regular, legal, written assignment of the Marshall judgment, and lived and died without executing or effectuating his kindly intent to make this assigned property of his over to his sister—the court of equity cannot virtually make a will for him; and thus establish a most dangerous and impolitic precedent for the dealing with the estate of an intestate.

We find no error in the decree of the circuit court of Caroline complained of, and the same must be affirmed.

DECREE AFFIRMED.

Richmond.

WARE v. STARKEY.

FEBRUARY 5th, 1885.

1. SALES—*Judicial—Private*.—After decree in pending suit, to sell land to pay debts, debtor sells the land by written contract, undertaking to make vendee "sufficient title," takes for the purchase-money vendee's bonds payable to commissioners named in the decree, and a trust-deed on the land to secure them. The sale is confirmed by the court, and its receiver ordered to collect the bonds when due, and apply proceeds to the debts. Such sale is not a judicial, but a private sale. *Christian v. Cabell*, 22 Gratt. 82.
2. PRACTICE IN CHANCERY—*Reports*.—Master in his report must not go beyond the matters referred to him, and his report is a nullity so far as it relates to matters not referred to him. Therefore, when master gratuitously reports that certain bonds bear interest only from maturity, and there is no confirmation of so much of the report as relates to such gratuitous matter, the parties are not prejudiced thereby.
3. CONTRACTS—*Construction—Interest*.—Contract of sale, dated August 26th, 1873, says the bonds for the purchase-money are "to bear interest from this date." The trust-deed describes the bonds as "dated September 10th, 1873, with six per cent. interest from August 26th, 1873." The bonds say, "with six per cent. interest from date above," when there is no "date above," except the date of the maturity of the bond. Receiver collected the bonds with interest only from their maturity.

HELD:

The bonds bear interest from the date of the contract, August 26th, 1873, till paid.

4. PRACTICE IN CHANCERY—*Enforcing trust-deeds—Correcting mistake*.—Debtor having sold the land as above stated, the master having reported as aforesaid, and the receiver having collected the bonds with no interest until after their maturity, it was competent for that debtor

Syllabus—Statement—Opinion.

to bring his bill to enforce the trust-deed, or to reform any mistake in any part of the said writings, in order to collect the unpaid interest.

5. **PURCHASER WITH NOTICE—Case here.**—The trust-deed describing the bonds as bearing interest from August 26th, 1873, being duly recorded, C., being about to buy the land of the debtor's vendee, sees the bonds and the contract, and is told that the debtor claimed that the bonds bore interest from the date of the contract, nevertheless purchased the land.

HELD:

C. is not a purchaser for value without notice, and the land in his hands is liable for interest on the bonds from that date.

6. **ESTOPPEL—Written evidence—Parol.**—A party to instruments in writing, in the absence of all pretence of fraud, is estopped from proving that he did not read the instruments before executing them, and thus by parol obviate the effect of written evidence. *So. Mut. Ins. Co. v. Yates*, 28 Gratt. 585.
7. **WITNESSES—Professional experts.**—See opinion as to the value of their testimony.

Argued at Staunton, but decided at Richmond.

Appeal from decree of circuit court of Clarke county, entered May, 24th, 1884, in the chancery cause of Josiah W. Ware's administrator against Benjamin Starkey, William B. Claggett, and others.

Opinion states the case.

M. McCormick and Barton & Boyd, for the appellant.

McDonald & Moore and J. J. Williams, for the appellees.

RICHARDSON, J., delivered the opinion of the court.

This is a controversy as to whether the six notes or single bills, hereinafter to be referred to, bear interest from the date of the contract of sale, or only from the maturity of the bonds. Before, however, considering the main question, we must dispose of a preliminary question, raised by counsel for the appellees.

It is insisted that the appellant, the plaintiff below, has no

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right to prosecute this or any suit in the premises. To properly understand this question, a brief statement is here necessary. On the 26th day of August, 1873, pending a suit in chancery in the circuit court of Clarke, by the style of *Dobbin v. Ware*, for the sale of the lands of the late Josiah W. Ware, for the satisfaction of certain liens thereon, and where a decree had been rendered in said suit for a sale of same, and commissioners appointed to make the sale, said Ware (who had died since the institution of this suit), entered into a contract in writing with Benjamin Starkey, whereby he agreed to sell and Starkey to buy, a certain tract of land, in the contract described, at the price of \$60 per acre, payable in six annual instalments. The contract provides that the number of acres in the tract should be ascertained by survey as soon thereafter as convenient, and that Starkey was to execute his bonds for the purchase-money to bear interest at six per centum *from this date*, and to be secured by deed of trust on the property. The survey was promptly made, and on the 10th day of September, 1873, Starkey executed to F. W. M. Holliday, S. J. C. Moore, A. McDonald and A. Moore, Jr., the commissioners in the said suit of *Dobbin v. Ware*, his six "notes," dated the 10th day of September, 1873, and the following is a copy of one of them, all being in the same form:

"On the 26th day of August, 1879, I bind myself, my heirs, &c., to pay to F. W. M. Holliday, S. J. C. Moore, A. McDonald and A. Moore, Jr., commissioners in chancery in the suit of Dobbin and Ware, the sum of six hundred and sixteen dollars and fifty cents (\$616.50), with six per cent. interest, from date above, until paid, homestead exemption waived.

"Witness my hand and seal September 10th, 1873.

"BENJAMIN STARKEY, [Seal]"

Then, on the same day (September 10th, 1873), Starkey executed his deed of trust to secure said "six notes dated

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10th day of September, 1873, with six per cent. interest from 26th August, 1873, and payable respectively 26th August, 1874, '5, '6, '7, '8, '9, for the sum of six hundred and sixteen dollars and fifty cents (\$616.50) each, homestead exemption waived." The trust-deed was duly recorded.

In the copy of the contract produced in evidence, the last two lines thereof read: "The bonds for the purchase-money to bear interest at six per cent. from this date, and to be secured by deed of trust on the property." In these two lines the words "from this date" are plainly interlined, and admittedly in the same handwriting of the body of the instrument, that of the vendor, Ware.

The sale thus made by Ware was reported to court and confirmed in the case of *Dobbin v. Ware*, and the said bonds drawn payable to said special commissioners being at the same time presented in court, were by the court directed to be collected by A. Moore, Jr., as receiver, and the proceeds applied to the payment of the debts of said Ware, ascertained in said suit of *Dobbin v. Ware*. In that suit the court then proceeded to ascertain the amount of Ware's debts, to be provided for by a further sale of his lands, after applying the proceeds of said Starkey bonds; and in fixing the amount of said bonds so to be applied, the master commissioner, it seems, without reference to the said deed of trust or contract, but looking only to the wording of the bonds, concluded that they did not bear interest until after maturity, and to that extent discounted their face value, which action of the master commissioner was at the succeeding term of the court confirmed, and the receiver afterwards made collections accordingly.

Starkey paid the first bond, but finding he would not be able to make the other payments, and having been put in possession, and having seeded a crop of wheat in the fall of 1873, in 1875 sold the land to Wm. B. Claggett, one of the appellees, who paid off the said five bonds assumed to be paid by him in

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his purchase from Starkey, as demanded by said receiver, A. Moore, Jr.

When the last Starkey bond had become due and was paid, Ware discovered that the receiver had not collected the interest on the bonds, except from maturity; and thereupon Ware filed his bill, to enforce the contract according to its terms, and insisting that, according to the true construction thereof, said bonds bore interest from their dates. At the hearing the court below dismissed Ware's bill, and the case is here on appeal from the decree of dismissal.

Preliminary to the main question, it is contended by the appellees (1) that this is a suit simply to correct an alleged mistake in the execution of said bonds by Starkey; and (2) that the sale of the land to Starkey was a judicial and not a private sale, and therefore nobody, except the court or its officers, has any right to sue in respect to its enforcement.

A glance at the bill filed by Ware will show that, whilst it asks for alternative relief by way of treating the bonds as mistakenly executed in respect to the time from which they should bear interest, the leading feature of the bill is to enforce the contract for the alleged unpaid balance of purchase-money—the complainant insisting in his bill that the true intent and meaning, looking to all the instruments executed in connection with the sale of the land, was that the entire purchase price bore interest from the day of sale, as provided in the contract of sale. The prayer for alternative relief in the event the court should not adopt the main view and purpose of the bill by no means gave to the suit the character of one simply to correct a mistake.

It is in the second place true that there was, in the suit of *Dobbin v. Ware*, a decree for the sale of Ware's land, but it is also true that in that situation Ware made sale of a portion of his land to Starkey—land subject to said decree for sale—that he took the bonds payable to said commissioners appointed to sell his land, and tendered to the court said contract of sale,

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made in his own name, and said bonds executed as aforesaid in satisfaction to that extent, of said decree against him, and the court accepted and confirmed the sale and received the bonds, directing its receiver to collect the same, and apply the proceeds to Ware's debts proven in that suit. Ware, while he made the sale in his own name, and for obvious reasons took the bonds payable to said special commissioners, took a trust-deed securing the bonds so drawn, and then with his wife conveyed the land to Starkey according to the terms of *his* contract of sale. These terms were for "sufficient title"—*i. e.*, good title—or, in other words, a deed with the usual covenants of warranty. It is manifest the court had no authority to enter into and did not enter into any such covenant. The courts never undertake, therefore, to warrant title to land sold under its decrees. The court only sells such title as is lodged in it by operation of law, and only warrants specially.

A decree for the sale of his land was hanging over Ware; he was struggling to avoid utter wreck; he doubtless believed he could sell, either to his neighbors or others, in parcels to better advantage than a sale under the hammer would be; and therefore he sold this parcel to Starkey, advising him at the time of his purpose to put the contract of sale into the hands of the commissioner of the court to meet to that extent the demands against him in the suit of *Dobbin v. Ware*. The bonds and trust-deed were taken, and the latter was duly recorded. The record also shows that the contract and bonds were presented to the court, and that then it was suggested, at the bar, that the bonds only bore interest from maturity, but that Ware, who was present in court, then asserted and claimed that they bore interest from the date of the contract. The court then, in adopting for the purposes of the suit the sale made by Ware and receiving the bonds aforesaid, received them to be enforced according to the real meaning and effect of the contract. The contract and bonds were exhibited in open court, and attention called to the real nature and purport of the contract. The

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trust-deed was there of record, and whatever doubt there might be as to the question of interest, if only the bonds were looked to (for they are clumsily drawn), both the contract and the trust-deed concur in giving interest from the date of the contract of sale, August 26th, 1873, as contended by Ware.

The sale thus made was inadequate to the discharge of the debts decreed against Ware, and the court directed its commissioner to ascertain how much more of Ware's land must be sold, after the application of the proceeds of the sale to Starkey, in order to satisfy the debts decreed against Ware in said suit of *Dobbin v. Ware*. It was the mistake made by the commissioner under this order of reference and the failure of the court to observe and correct it that has produced this litigation. The commissioner ignored the terms of the contract and deed of trust, and, looking only to the loosely-drawn bonds, came to the conclusion that the bonds only bore interest after maturity, and ascertaining their present value (a matter not referred to him) upon that basis and in that way arrived at, and reported the additional quantity of land necessary to be sold. This unauthorized act of the commissioner, in passing upon a matter not referred to him, could not preclude Ware from the assertion of his rights, if he was injured thereby, even if the court did, at the succeeding term, confirm the report of the commissioner—an act, it may be, of inadvertence on the part of the court, or, it may be, that the matter of interest improperly passed upon by the commissioner and thus involved in his report was not readily discernible, if at all, by an inspection of the report by the court. There is in the record no decree referring to the commissioner the question as to from what time said bonds bear interest. Nor is there in the record any evidence of any decree in terms confirming, or that can be construed as equivalent to a confirmation of the conclusion arrived at by the commissioner, that said bonds only bore interest after maturity.

It is insisted by counsel for the appellees that the action of the commissioner in treating the bonds as not bearing interest

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until after maturity was approved by a decree confirming the commissioner's report in that as in other respects. But the record shows that the question, as to the time from which the bonds bore interest, was not referred to the commissioner. That, in fact, was a question to be decided by the court upon inspection of the bonds and other instruments bearing thereon. A commissioner must not go beyond the matters referred to him, and it is laid down, in one of Lord Bacon's orders, that if a master reports as to matter which is not referred to him, his report, so far as refers to that matter, is a nullity. It has been decided that in such a case the proper course is not to except to the master's report, but, before it is confirmed, to apply to the court that it may be referred back to the commissioner to review his report, but that, if no such application is made, and the report should be confirmed, the court will pay no attention to it, except so far as it is warranted by the decree. 2 Daniel's Chy. Pl. and Pr. 1296; 2 Barton's Chy. Pr. 634-5, and authorities there cited. Nor is a commissioner's report confirmed except by an express decree of court. Matthew's Comm's. 144. Minor's Inst., Vol. 4, part 2nd, page 1248.

It is apparent that the sale by Ware to Starkey was a private and not a judicial sale. *Christian v. Cabell*, 22 Gratt. 82. This being so, and neither Starkey nor his vendee, Clagett, being parties to the suit of *Dobbin v. Ware*, but mere stakeholders in succession, and required to pay the price agreed to be paid by Starkey to the court in the suit aforesaid, it is manifest that the pleadings and parties in that suit were not adapted to the litigation between Ware and Starkey and Clagett of the question about interest, and that Ware was not, by anything that occurred in the suit of Dobbin against him, precluded from the assertion of his rights in this suit, though such rights ought to have been enforced in that suit by collecting the full amount due him—it being to the interest of his creditors, and, therefore, to his interest. And it can make no difference that the suit of *Dobbin v. Ware* is still pending, and debts to which the

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proceeds of the Starkey bonds, as collected, were applied, remain not satisfied in full; for, if any recovery which may be had in this suit should go to those debts or others, in preference to Ware and his assigns, the legal means for securing the proper application are ample. Ware did, in the *Dobbin v. Ware* suit, all that he could in reason be required to do. He presented in open court his contract with Starkey, and also Starkey's bonds; the matter was then and there discussed in respect to the question of interest, and Ware's claim to interest from the date of the contract asserted. If the court has failed by inadvertence or otherwise to collect by its officer the full amount due upon the Starkey bonds, Ware is not precluded, but it was his duty, as well as privilege, to assert in his own and in behalf of his creditors, his rights under his contract with Starkey. This brings us to the consideration of the main question—from what period do the Starkey bonds bear interest?

It will be observed that while the bonds (described as notes in the deed of trust) provide for "six per cent. interest *from date above* until paid," there is no date above, except in the body of the instrument, which is "August 26th," the dates of the maturity of the bonds respectively in the years 1874 to 1879, inclusive, and that the *dates below*, the date of each of the bonds is September 10th, 1873. It will be observed further that the contract, even if the interlined words "*from this date*" be omitted, provides that the purchase-money bonds shall "bear interest at six per cent.," which necessarily means, in the absence of any provision expressly to the contrary, *from the date of the contract*. Not only so, but the deed of trust which was necessarily executed after both the contract and the bonds, and which is the additional and independent promise of Starkey to pay "six notes dated 10th day of September, 1873, with six per cent. interest from 26th August, 1873," &c., which is not the date of the bonds and trust-deed, *but is the date of the contract*, which, with or without the interlined words, is a contract for interest from its date. These instruments, all bearing upon

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the matter in hand, must be read together, and while they are all written by the same unskilled hand, it is by looking at them together that we may with certainty arrive at the true intent and meaning of the parties—the true obligation of the contract. With these circumstances standing boldly forth, it is idle to say that the words “*with interest from the date above*” refer, or could have been intended to refer, to the date of the maturity of the several bonds, for to so construe them would involve the absurdity of making a sale of land and providing for payment at a stipulated time, yet in the evidence of the debt, assuming that it is not to be paid at the time specified. Such a construction could only be warranted in the absence of everything except the bonds to look to, or by some express agreement clearly intended to vary the contract. But here, with the contract before and the deed of trust after the bonds, there can be no reasonable pretext for saying that the bonds do not bear interest from August 26th, 1873, the date of the contract. In other words, it is idle and opposed to common experience to say that the parties meant to contract for the payment of money on a day certain, and at the same time to provide for the payment of interest from that date. It is obvious that the words in the bonds “from the date above” is the result of a confusion in the mind of the draftsman of the date at which he was writing, with the date and terms of the contract written only a few days before by the same hand; and having this confusion once stamped upon his mind, the draftsman (Ware himself), naturally enough carried the bungling form into each of the other bonds, all of them doubtless having been copied from the one first written.

But it is insisted by counsel for the appellees that the provision for the payment of interest has been wrongfully interpolated into the contract; and the whole body of the contract being in the handwriting of Ware, the direct imputation is that Ware interlined the words “from this date” after the contract was signed by the parties; in other words, that he committed

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the crime of forgery. This is a fearfully severe arraignment of the character and memory of a man now in his grave—especially in view of the fact that the contract, without the interlineation, was a contract for interest from its date; that the trust-deed to secure the bonds has precisely a corresponding provision; and that Starkey signed and executed both instruments, and there being as to the latter no pretence of interlineation or change in any respect.

Starkey seeks to avoid this provision in the trust-deed by saying he did not read it carefully. This cannot avail him. He signed both papers, and he cannot be heard to say he did not read the one or the other. *So. Mutual Ins. Co. v. Yates*, 28 Gratt. 585.

Again: From the facts and circumstances disclosed by the record it was physically impossible for Ware to make any change in the contract after it was signed by the parties, for it is incontestibly established that the copy of the contract in evidence, with the words interlined, was when signed delivered by Ware to Starkey, and by the latter delivered for safe-keeping to Major S. J. C. Moore, a lawyer of experience and integrity, who says in his deposition that the interlined words "*from this date*" were there when he received it from Starkey; and he accounts for the contract all the time from then until produced in evidence. There was at the time of the contract another copy taken and kept by Ware until left by him with Mr. McCormick, one of his counsel in this suit. That copy is lost; but Mr. McCormick says, in his deposition in the cause, that it was left with him, that he recollects no interlineation in it, and that he supposes it was lost in several times removing his office and papers from one place to another.

A number of depositions were taken in the cause, the result of which is that, with or without them, it is impossible to read the contract, bonds, and trust-deed and come fairly to any other conclusion than that it was truly the agreement between the parties that Starkey should pay interest on the entire purchase-

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money from August 26th, 1873, the date of the contract. It makes no difference that Starkey afterwards sold to Clagett without interest, as the proof is that Starkey found out he could not pay for the land, and many motives doubtless influenced him to get rid of the land on the best terms he could.

Nor can Clagett complain. For when he was negotiating for the purchase from Starkey he was informed by the receiver, A. Moore, Jr., of Ware's claim about interest, but told by Moore that nothing had been heard of Ware's said claim for then over a year. But Clagett was not satisfied to act on this; but, being informed that the contract was in the keeping of Major S. J. C. Moore, he called on him, and was shown the contract, with the interlined words in it; and now, because Major Moore said to him in response to a question seeking his opinion, that "the interlined words looked a little bad," Clagett, as the holder of the land which he bought subject to a recorded trust-lieu, comes and says he is a purchaser for value without notice, when not only were all the avenues of information open to him, but were actually resorted to by him. Upon every principle of justice and right he is a purchaser with notice, and for so much of the debt of Starkey to Ware as remains unpaid, the land in the hands of Clagett is charged and liable.

But after the evidence was closed as to all who had any knowledge of the transaction, the defendants below, the appellees here, went to Washington city and took the deposition of E. B. Hay, a professed expert, and the contract in question underwent his scrutiny. This witness, when asked his age, occupation, and residence, gave himself a spacious introduction. He says: "I am thirty-four years of age; attorney-at-law; residence, Washington, D. C., for the past fifteen years. Besides the above profession named, I have devoted attention to the science of penmanship in every branch, especially that devoted to the comparison of handwriting, for the purpose of detecting forgery, spurious writings, &c., and have been accepted as an expert in handwriting before the courts in the District of

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Columbia, Maryland, Virginia, Pennsylvania, and other States; before congressional committees and the executive departments; several prominent cases being the *Cameron v. Oliver*, in the District of Columbia; the *United States v. Griffin*, in Virginia; the *United States v. Russell* and others; script forgery cases, in Yankton, Dakota, and the Springer-Donnelly-Washburn investigation before a congressional committee, in which almost every question pertaining to handwriting became a matter of controversy."

When asked if he had examined the contract here in question, he says: "I have examined the paper with a view to the handwriting and the priority of certain strokes. The handwriting is the handwriting of Ware, or the handwriting of the person who wrote 'J. W. Ware.' The greater part of the body of the handwriting appears to have been at one and the same time, leaving spaces for the name of the party of the second part, or 'Starkey,' to be inserted afterwards. Wherever the name 'Starkey' appears it is written slightly larger, and in nervous handwriting, and with ink that, to the eye, is darker than that used in writing the body of the instrument; after the word 'repairs,' on the nineteenth line, all that follows was written after the body of the instrument, and in the same nervous hand in which the word 'Starkey,' mentioned above, appears to have been written; the ink is darker than the body of the instrument, and the proportion of letters is slightly larger; the seals—that is, the scrolls showing the word 'seal'—were made by the person who wrote the body of the instrument, the word seal being in the same handwriting."

The original paper was produced at the argument, and inspected by this court. Tested by the common experience of persons accustomed to the use of pen, ink and paper, there is absolutely nothing to warrant the main conclusion arrived at by this expert, to-wit—that all of the body of the instrument after the word "repairs" was written after—that is, at a period of time subsequent to that at which the contract was made and

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signed. This involves the absurd and altogether unusual piece of carelessness of leaving below the bottom of the writing and between it and the first signature the space of full four blank lines, a space reserved, if we are to take the theory of this witness, sufficient for the purpose, and in which an entire clause of the contract was written after the same was signed by the parties. Common sense and common experience alike reject the idea. And not only so, but the positive testimony of Benjamin Starkey himself, the man who was a party to the contract, and who read it over carefully before signing it, says on oath positively and directly that, except the three interlined words, "from this date," the contract is the same as when signed by him. This so flatly contradicts and overturns the theory and conclusion arrived at by the expert, Hay, that comment is wholly unnecessary. And when we couple with this the facts before referred to, to-wit: (1) that the contract without the interlined words is in effect one for interest from date; (2) that the trust-deed provides for interest on the bonds from August 26th, 1873, the date of the contract; (3) that the copy of the contract kept by Colonel Ware, and left with Mr. McCormick, and by him lost, had no interlineation; and (4) that the copy with the interlined words was taken by the vendee, Starkey, and left for safe keeping with Major S. J. C. Moore, with the interlined words therein when he received it. We say, with these concurrent and conclusive facts prominently standing forth, there is no ground for the charge of forgery aimed at Colonel Ware, and the expert testimony must fall to the ground as utterly useless.

In Wharton's Law of Evidence it is said: "When expert testimony was first introduced it was regarded with great respect. An expert, when called as a witness, was viewed as the representative of the science of which he was a professor, giving impartially its conclusions. Two conditions have combined to produce a material change in this relation. In the first place, it has been discovered that no expert, no matter

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how incorrupt, speaks for his science as a whole. Few specialties are so small as not to be torn by factions; and often the smaller the specialty the bitterer and the more inflaming and distracting are the animosities by which these factions are possessed. Peculiarly is this the case in matters psychological, in which there is no hypothesis so monstrous that an expert can not be found to swear to it on the stand, and to defend it with vehemence when off the stand." * * * * "In the second place, the retaining of experts, by a fee proportioned to the importance of their testimony, is now, in cases in which they are required, as customary as is the retaining of lawyers. No court would take as authority the sworn statement of the law given by counsel retained on a particular side, for the reason that the most high-minded men are so swayed by an employment of this kind as to lose the power of impartial judgment; and so intense is this conviction, that there is no civilized community in which the reception of a present from a suitor does not only disqualify but disgrace a judge. Hence it is that, apart from the partisan spirit more or less common to experts, their utterances, now that they have as a class become the retained agents of parties, have lost all judicial authority, and are entitled only to the weight which a sound and cautious criticism would award to the testimony itself. In adjusting this criticism, a large allowance must be made for the bias necessarily belonging to men retained to advocate a cause, who speak not as to fact but as to opinion, and who are selected on all moot questions, either from their prior advocacy of, or from their readiness to adopt the opinion to be proved. In this sense we may adopt the strong language of Lord Campbell, that 'skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence.'"

Certain it is that the above philosophic view of the subject is truthfully illustrated in this case. Not only is the main conclusion of the expert absolutely overthrown by the clearly as-

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certained, actual facts, but there is not an intimation of importance in the entire deposition of this witness which is not either opposed to the common observation of all men in respect to writing under similar circumstances, or that may not be explained to every intelligent, practical mind as dependent upon causes quite the reverse of what the speculations of this skilled witness lead to. But it is quite unnecessary to go into an extended analysis of this testimony, though to do so would clearly expose the utter fallacy and unreliability of the whole story.

In any and every view of the case the decree appealed from is clearly erroneous, and must be reversed and annulled, with costs to the appellant, and the cause remanded to the said circuit court, to be proceeded in to final decree, in accordance with the views expressed in this opinion.

LACY, J., dissenting, said:

A chancery suit having been instituted in the circuit court of Clarke county for the purpose of subjecting the lands of one Josiah W. Ware, to sale to satisfy the liens thereon, by Dobbin and others, creditors of the said Ware, on the 26th day of August, 1873, the said Ware made a sale of certain lands belonging to him to Benjamin Starkey, at an agreed price. The sale was to be on a credit of one, two, three, four, five and six years, and the bonds to be made payable to the commissioners of the court already appointed in the said suit of *Dobbin v. Ware* to sell the land in question; the agreement was reduced to writing, and signed by the parties. On the 10th day of September, following, the six bonds were executed by Starkey, for \$616.50 each, payable respectively 26th day of August 1874, 1875, 1876, 1877, 1878 and 1879. The following is the first bond:

“On the 26th day of August, 1874, I bind myself, my heirs, &c., to pay to F. W. M. Holliday, S. J. C. Moore, A. McDonald and A. Moore, Jr., commissioners in chancery in the suit of

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Dobbin and Ware, the sum of six hundred and sixteen dollars and fifty cents (\$616.50), with six per cent. interest from date above, until paid, homestead exemption waived.

“Witness my hand and seal, September 10th, 1873.

“BENJAMIN STARKEY. [Seal.]”

The other bonds are like the first, payable as stated above, and were secured by a trust-deed on the land in question, which was conveyed by Ware to Starkey. This sale was reported to the court and confirmed in the suit of *Dobbin v. Ware*. The bonds drawn payable to the special commissioners were by the court directed to be collected by A. Moore, Jr., as receiver, and the proceeds were ordered to be applied to the payment of the debts of Ware. The court, in that suit, then proceeded to ascertain the amount of the debts of Ware, to be provided for by further sales of Ware's lands, after applying the proceeds of the Starkey bonds. In fixing the amount of the bonds to be applied to the debts, the commissioner of the court discounted the bonds upon the ground that they bore no interest until maturity. The receiver of the court collected the bonds as if they bore no interest until maturity. Starkey paid one of the bonds, and in June, 1875, sold the land to the appellee, W. B. Clagett, subject to the then existing liens thereon. Clagett paid the remaining purchase-money to Starkey on the first day of February, 1880.

In April, 1882, this suit was instituted by Ware against Starkey, Clagett and A. Moore, Jr., general receiver, and Neill, trustee, in the trust-deed, the object of which is to obtain interest on the six bonds cited, and set forth above from their date to their maturity—that is, one year's interest on one bond, two years' interest on the second, and so on.

It will be remembered that the bonds were executed on the 10th day of September, 1873, in pursuance of a written agreement executed August 26th, 1873; that the date of maturity of each bond was made to conform to, or refer to, the agree-

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ment of August 26th, although the bonds were dated September 10th—thus, the first bond maturing in one year. It provided thus on the 26th day of August, 1874, it was to be paid, one year from the date of the agreement—not one year from the date of the bond—and with this all the bonds corresponded. But the said agreement provided that the bonds should carry interest from date, and it was and is contended that, although the bonds declare upon their face that they shall bear interest from the date above, the date of their maturity respectively being written above, yet that, by the agreement of the 26th of August, they were to carry interest from date, the provision in the agreement must prevail. On the other hand, it is insisted that, as the said agreement is interlined, the words “from their date” being written between the lines; that the contract has been altered, and that the bonds must be taken as the evidence of the debt, and the ascertainment of its amount, by the mutual conduct of the parties, the one in executing, the other in accepting and collecting them. Many depositions have been taken in the cause. Ware, the vendor, then living, has testified; Starkey, Clagett, A. Moore, Jr., S. J. C. Moore and others have testified. An expert in handwriting has been employed to give evidence concerning the altered contract, or rather the apparent alteration in the contract; and the cause coming on the 24th of May, 1884, the circuit court dismissed the bill of the plaintiff, and ordered that the special commissioners appointed in the suit of *Dobbin v. Ware* execute a release deed to Clagett, releasing the Starkey trust-deed.

Whereupon the appellant applied to this court for an appeal, which was allowed July 7th, 1884.

The first question raised by the appellees here, the defendants in the circuit court, is that the bonds having been taken payable to the special commissioners in the suit of *Dobbin v. Ware*, having been reported to the court, and the sale approved, and the bonds collected by the court, in accordance with the report of its commissioner, and the proceeds distributed among the

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creditors of Ware according to their claims—that the question raised by this suit has been finally settled in that suit, from which no appeal has been taken. It is contended on the other hand that the question at issue here as to interest on the Starkey bonds, between their date and maturity, was not raised before the court in the suit of *Dobbin v. Ware* in such a manner as would enable the court to decide the question, and that it was not decided in that suit. That while the report of the master of October, 1874, in that cause set forth the bonds, and ascertained their present value, discounting the interest before maturity—that notwithstanding the fact that this report was confirmed by the court—yet the question as to interest on these bonds was not referred to this commissioner by the court, but was reported by the commissioner upon request; and Lord Bacon is cited as saying that if a master reports as to matter which is not referred to him, his report, so far as relates to that matter, is a nullity (2 Dan. Ch. Pr., page 1296), which is true as to impertinent matter, and the same will be disregarded by the court, which deals only with matters pertinent to the inquiry in hand. Generally speaking, it is the duty of the master to meet all the difficulties that may arise in the discharge of his official duty. In some way or other he must so provide as that all the accounts and inquiries directed by the decree shall be fully taken—at least, it is the master's duty to go on with them until he finds a difficulty arising from want of sufficient powers, and then an application must be made to the court, either by the master or the parties, to do that which is necessary to supply the defect of his authority. 2 Dan. Ch. Pr., page 1298. In this State it is the practice for the master to make report where matters of account have been referred to him with any matter specially stated deemed pertinent by himself, or which may be required by any person interested to be so stated; and with reference to a large class of accounts he is expressly so required by statute—chapter 128, section 2, Code of Virginia 1873.

Under the decree of May, 1874, the commissioner was required to audit and report to the court any further liens on said Ware's land, that might be produced before him. In making this report of liens, the commissioner, deducted from their aggregate the amounts which had been paid in various ways, so as to show to the court, the amount of unpaid liens which would have to be provided for in the suit, which was the direct object of the suit, and these bonds and the McClellan bonds, having been received by the court, were reported as payments; and in so reporting them, it was necessary to state their aggregate amount as of that date, which was done, rating them as upon their face they appeared as bearing interest upon their maturity. If he erred in this statement, his report was open to exception and correction by the court; but this was not done; his report was received and acted on without exception and the bonds collected by the court, and the proceeds distributed.

But this is not all. On the 3rd day of November, 1874, Ware, not excepting to the report just mentioned, *filed his petition* in the cause, seeking to restrain the further sale of his land, alleging, among other things, as follows: "Your petitioner avers that by the true contract and understanding between him, said Starkey, and McClellan, the said bonds were to bear interest from their respective dates, and he prays that the decree of October term, 1874, in so far as it allows interest against him, *may be reviewed.*" To this petition I find no reference in the opinion of the majority, and it is held that Ware is not precluded by anything in that suit. This petition was rejected, and he did not appeal (this being in the year 1874), but acquiesced until the bonds were all collected, and the proceeds distributed, and then, in 1882, he institutes this suit, and seeks to have this same relief. His application in this suit comes too late, the matter having been decided against him in the suit of *Dobbin v. Ware*, in a court of competent jurisdiction, his remedy if any, is in that suit, by appeal to correct any error therein, to his injury. And his bill in this suit was properly dismissed.

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It is not necessary to discuss the question of interest on the bonds as raised in this case, but a simple inspection of the bonds, will clearly and unmistakably show that the obligor in the bond, agreed to pay interest only from maturity, the date of the maturity of the note was written in the first line, and the agreement was written in the body of the bond, to pay interest from that date, and that question was correctly so decided by the circuit court in this suit, as well as in the suit of *Dobbin v. Ware*, and I am of opinion to affirm the decree of the circuit court in this cause, appealed from.

As to the expert's testimony in this case, without any general comment as to expert testimony, except to say that it is often most useful in illuminating the path to truth and justice, and in the hands of discriminating tribunals of justice, is often the only method by which covert criminal acts can be unearthed and exposed, and the undenied fact that experts are sometimes mercenary and sold for a price, is no argument against such testimony in any case where it has been valuable, and not corrupt. But in this case, no expert was required to detect the fact that a bond carried interest from a date expressly set out and declared on its face in plain words.

If one date is at the beginning of the first line of the bond, and the date of its execution at the end of the last line. and it is expressly declared in the bond that it shall carry interest from the date above, that is plain enough without the aid of any expert, as the circuit court decided in a suit between all these same parties nine years before. The obligee or his assignee instituted that suit, and as the contract made before the bonds were executed has the words "to carry interest from date" interlined, it required no expert to detect the fact that *this* provision was interlined, when this suit was instituted, to recover the interest on these bonds between the date of their execution and the date of their maturity—nine years after the principal had been paid and disbursed in the circuit court in the suit of *Dobbin v. Ware*, in which these parties were all before the court, and from

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which no appeal was taken. The effect of the trust-deed did not require the construction of an expert. This case does not, and did not, in my opinion, turn upon any discovery of the expert, although one was employed to examine the altered contract, or the interlined contract.

In my opinion the decision of the circuit court of Clarke county is plainly right.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that said decree of the circuit court of Clarke county, rendered on the 24th day of May, 1884. dismissing the complainant's bill with costs to the defendants, and ordering the special commissioner appointed by said court, in the case pending therein of *George W. Dobbin v. J. W. Ware*, to execute a release of the deed of trust on the land referred to in the proceedings in the cause, executed by B. F. Starkey on the 10th day of September, 1873, to S. S. Neill, trustee, is wholly erroneous. Wherefore it is considered that the said decree be reversed and annulled, and that the appellant recover of the appellees his costs by him expended in the prosecution of his appeal aforesaid here; and the cause is remanded to said circuit court, to be further proceeded in to final decree, in accordance with said reasons in writing, filed as aforesaid. Which is ordered to be certified by the clerk of this court at Richmond to the clerk thereof at Staunton, and by the latter certified to the said circuit court of Clarke county.

DECREE REVERSED.

Richmond.

BOWMAN v. WOLFORD.

FEBRUARY 5th, 1885.

1. **SPECIFIC PERFORMANCE—*Parol contracts.***—B. by parol contract sells W. an acre of woodland for \$30, to be paid in three years, in work, and puts him in possession. W. clears the land and builds on it a dwelling, which with his family he continues to occupy, and in work paid B. the purchase-money.

HELD:

W. is entitled to a conveyance in specific performance of the sale of the land.

Appeal from decree of circuit court of Rockingham county, rendered April 25th, 1884, in the chancery cause of John Wolford against Joseph M. Bowman for specific performance of a parol sale of one acre of woodland. The decree being against the defendant, he obtained an appeal to this court.

Opinion states the case.

Strayer & Liggett, for the appellant.

G. W. & B. R. Berlin, for the appellee.

HINTON, J., delivered the opinion of the court.

This case was submitted at the late session of this court at Staunton and brought here for decision.

It is an appeal from a decree enforcing specific execution of an alleged parol agreement for a sale of land.

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The bill alleges that the plaintiff, John Wolford, purchased, in March 1880, of the defendant, Joseph Bowman, one acre of woodland, situated in the county of Rockingham, Va., in what is known as the "Meadows," for thirty dollars, payable in three years, and promised the plaintiff, who is an illiterate man, unable to read or write, to have the contract of sale reduced to writing, which was never done. It further alleges that Bowman put the plaintiff in possession of the said acre of woodland; that the plaintiff cleared it off; built a log-house upon it; enclosed it with a good fence, and has lived in the house with his wife and children ever since the spring of 1880; and has fully paid Bowman the purchase money in work performed for him. And, that notwithstanding he has done all that was agreed to be done on his part, Bowman refuses to execute a deed to him for the said lot of land.

To this bill the defendant filed an answer, in which he denies that there ever was any such contract as that stated by the plaintiff; and says that the true contract between them was: "That respondent was to let the complainant have the said property for two years, free of rent, for putting up a house thereon; and if at the end of said two years, he could pay \$30, he, the complainant, should have the property." That although the said two years have long since expired, he has never paid said sum of thirty dollars. And the answer then adds: "This respondent *has been informed* that he agreed to give complainant *three years* to pay for said property. If this be true, the complainant is indebted to the respondent for rent of said property only from February, 1882, none of which rent has ever been paid, and for which respondent claims he is entitled to the sum of \$15, as of February, 1883."

Now the first observation that I have to make in the case is, that the answer, although it is sufficiently explicit and positive in its denial that there was any such contract as that stated by the plaintiff, is not entirely consistent with itself in its statement of the contract, as stated by the defendant; for the positiveness of

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the statement that he was to let the plaintiff have the lot of land for *two* years free from rent for putting up a house thereon is certainly very much qualified and weakened by the succeeding statement that the defendant is *informed that he agreed to give the plaintiff three years to pay for the property*, and that *if this be true*, the plaintiff will only owe him rent from February 1883. And if the decision of the case depended upon the weight to be attached to this portion of the answer, it would be a matter of nicety and difficulty to determine the exact extent to which the positive statement of the defendant as to what constituted the contract between the parties was impaired by the subsequent inconsistent admission. *Countz v. Geiger*, 1 Call. 190; *Fant v. Miller & Mayhew*, 17 Gratt. 210; *Powell and wife v. Manson*, 22 Gratt. 185; *Jones v. Abraham*, 75 Va. R. 470. But this portion of the answer consists of affirmative matter, and being unsustained by the evidence in the cause, may be laid out of view, except in so far as the partial admission of the defendant that the plaintiff was to have *three* instead of two years, as he had at first stated, within which to pay for the land may tend to corroborate the plaintiff's account of the contract.

The questions for the court then are, did Wolford make the contract for the purchase of the lot of land set out in his bill; and if so, did he fully pay the purchase price within the required period. Upon these points the evidence leaves little room for even doubt. For the testimony of both the witness Kline and the plaintiff, which it is unnecessary to detail, taken in connection with the admission of the defendant in his deposition, that there was a sale; and the admission in his answer, that three years was the period allowed the plaintiff within which to pay, fully establish the contract as set out in the bill; whilst the admission of the defendant, made to the witness Kline since the institution of the suit, that he still owed the plaintiff Wolford eighteen dollars, taken in connection with the erroneous charges of \$5.40 and \$4 made against the plain-

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tiff for interest and logs, and augmented by the proper credits for services which the defendant admits he received, will equally establish that the lot of land has been fully paid for. It is unnecessary to say more.

The decree of the circuit court of Rockingham county is plainly right, and must be affirmed.

DECREE AFFIRMED.

Richmond.

McINTOSH, TREASURER, v. BRADEN & ALS.

(*Fourteen cases.*)

DUNNINGTON, TREASURER, v. HURT & ALS.

(*Five cases.*)

THE COMMONWEALTH v. CONSANI & ALS.

(*Three cases.*)

FEBRUARY 5th, 1885.

1. APPELLATE COURT—*Jurisdiction—Unconstitutional.*—Act of March 12th, 1884, is unconstitutional so far as it confers upon this court jurisdiction in all cases of coupons arising under act of January, 14th, 1882, without regard to the amount in controversy, being in conflict with Article VI of State Constitution fixing minimum jurisdictional amount in cases purely pecuniary at \$500.

Appeals of right from fourteen judgments of the circuit court of Loudoun county, rendered October 28th, 1884, affirming the judgments of the county court of said county, rendered May 12th, 1884, upon the several petitions of Florence Braden's trustee, John W. Wenner, Benjamin J. Grubb, William H. Brown, Summerfield Bolyn, Enoch Fenton, James M. Walker, John W. Garrett, Thomas R. Smith, Jeannette Raphael's trustee, Joshua Hatcher, Edward Nichols, The Mutual Fire Insurance Company of Loudoun county, and Samuel N. Brown, citizens and tax-payers of said county, respectively, filed under act of January 14th, 1882, to verify and identify certain past-due tax-receivable coupons cut from the bonds issued by the State under act of March 30th, 1871, which had been ten-

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dered by the said petitioners to the appellant, James L. McIntosh, as treasurer of said county, in payment of their several taxes, and for the recovery of amounts thereof which the petitioners had paid, under protest, to the treasurer after his refusal to receive the coupons.

Also appeals of right from five judgments of the corporation court of Lynchburg, rendered September 11th, 1884, upon similar petitions of S. C. Hurt, Lynchburg Gaslight Company, Winfree, Lloyd, and Ford Brothers & Company, citizens and tax-payers of said city, filed under the same act and for like purposes.

Also appeals of right from three judgments of the hustings court of the city of Richmond, rendered upon similar petitions of L. Consani, Alexander Duval, trustee for A. A. Exall, and John Tyler, trustee for M. V. Tyler, citizens and tax-payers of Richmond, filed under the same act and for like purposes. The sum in controversy in each case was less than \$500, exclusive of costs. The facts and the judgments in each case were the same; the names of the parties and the sums and dates being different. The judgments being all against the several treasurers, appeals of right were taken to this court under the act approved March 12th, 1884, which, in all coupon cases arising under the said act of January 14, 1882, confers on this court jurisdiction, without regard to the amount in controversy. The respective batches of cases were heard together. The Loudoun batch having been heard first, and LACY, J., having delivered the opinion of the court therein, at the subsequent hearing he merely referred to that opinion as appropriate to the second, and HINTON, J., did the same as to the third batch of cases.

Attorney-General F. S. Blair and W. R. Meredith, for the plaintiffs in error.

Edward Nichols, for the Loudoun defendants in error.

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Richard L. Maury and Sands & Bryan, for the other defendants in error.

LACY J., delivered the opinion of the court.

These cases are brought to this court on appeal from the circuit court of the county of Loudoun, under the act of the general assembly approved March 12th, 1884, entitled an act to give an appeal as of right to the Commonwealth in all cases where suits are instituted under the act of January 14th, 1882, entitled an act to prevent frauds against the Commonwealth, and the holders of her securities in the collection and disbursement of her revenues.

The controversy in these cases involves in each case less than \$500, and the first question to be decided in this court is upon the motion to dismiss the appeal in each case for want of jurisdiction in this court.

The constitution of Virginia provides that the jurisdiction of the courts of the Commonwealth, and the judges thereof, except so far as the same is conferred by the constitution, shall be regulated by law. Jurisdiction is conferred upon this court by the act of March 12th, 1884, in all cases under the act of January 14th, 1882, without regard to the amount involved in the controversy; and this is within the power of the legislature, unless the power of the legislature upon this subject is restricted by the constitution of the State.

The second section of Article VI. of the constitution, however, provides that this court shall not have jurisdiction in civil cases when the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in certain enumerated cases, wherein these cases are not included.

This section imposes a restriction upon the legislature in this respect, and it is not, therefore, within the power of the legislature to so regulate the jurisdiction of this court; and so much of the said act as confers this jurisdiction on this court is

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in violation of this section of the constitution, and is therefore void.

It is, however, contended that, as the Commonwealth is not expressly mentioned in the section of the constitution just cited, the State is not bound thereby upon well-settled principles. But the constitution in this respect limits the power of this court, and this court cannot undertake to review the circuit court's decision in these cases without violating the constitution in a provision expressly denying to this court jurisdiction in the premises.

The legislature is restricted from granting this court such jurisdiction, and the act, therefore, confers no jurisdiction upon the court, and the constitution not only does not give, but expressly denies such jurisdiction.

It follows that this court has no lawful authority to review the cases, and the appeals must be dismissed for want of jurisdiction. See the case of *Barnett v. Meredith*, 10 Gratt. 650, where, in the opinion of Judge Allen, this question is carefully considered, and this provision is held to impose a restriction on the power of the legislature. See also the case of *The Commonwealth v. Moore*, 1 Gratt. 300, opinion of Judge Baldwin, saying: "The court is of opinion that the general rule of law, which exempts the Commonwealth from the operation of the statutes of limitation, is applicable to original controversies, and not to cases in which the rights of the parties have been adjudicated by the judgment, decree, or sentence of a court of competent jurisdiction. In such cases the question, whether the merits of the judicial decision can be reviewed by another tribunal must be governed by the laws prescribing and regulating the jurisdiction of the appellate forum." And it was held to be the duty of the court to withhold a consideration of the merits of the cause, though no objection was taken by plea or otherwise, and even though the point should be expressly waived by consent of the parties.

We think it is safe to follow the lead of these two cases de-

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cided in this court on this subject, and holding ourselves bound by the express mandate of the constitution, notwithstanding the express jurisdiction conferred upon this court by statute. But it is earnestly contended here, that the question here is not the amount involved, but the genuineness of the coupons. This is completely answered by the counsel for the tax-payer, that on a suit upon a bond, for a sum of money less than five hundred dollars, jurisdiction could not be conferred upon this court by the plea of *non est factum*; the amount in controversy would remain the same as it does here, and the amount involved is the amount of the coupons tendered and refused.

We are of opinion to dismiss the cases for want of jurisdiction.

HINTON, J., concurred.

LEWIS, P., concurred in the results, but said:

I concur in the results of the opinion of the court, though not entirely in the reasons upon which it is founded. My own views, therefore, will be briefly stated.

It is a familiar principle of the common law that the king is not bound by any act of parliament, which would divest or abridge his rights or remedies, unless he be named therein by special or particular words. Hence, he is not bound by statutes of limitation, bankruptcy, set-off, and the like. And the same principle applies to the government of the United States and the Commonwealth. Where, however, a statute gives a new estate or right, the king and in like manner the Commonwealth, is as much bound by the act, as to the manner of enjoying such estate or right, as the subject or citizen. This is a well settled rule of construction, and is no less applicable to a written constitution than to an ordinary act of the legislature. *United States v. Herron*, 20 Wall. 251; *Commonwealth v. Ford*, 29 Gratt. 683.

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The constitution provides that this court shall not have jurisdiction in civil cases where the matter in controversy, exclusive of costs, is less in value or amount than \$500, except in certain specific cases which need not here be mentioned. And the question is, whether this general language embraces the Commonwealth; or, in other words, whether it forbids the legislature from conferring jurisdiction on this court in ordinary civil cases, involving less than \$500, in which the Commonwealth is a party or interested. I concur in the opinion that it does. The right of appeal is not conferred by the common law. It is derived from the written law, and must therefore be exercised subject to the limitations prescribed. Upon this principle it was held in the case of the *Commonwealth v. Moore*, 1 Grattan, 300, that the Commonwealth was bound by a statute, though not particularly named therein, which limited the right of appeal to five years from the date of the judgment or decree complained of. This was decided in 1844; and with this interpretation of the law the framers of the several constitutions which have since been adopted by the people of Virginia were presumably familiar, and they have not seen fit to alter it. We must, therefore, construe the constitutional provision relating to appeals in the light of that decision. And this being so, and inasmuch as the legislature in regulating the jurisdiction of the courts must act within the scope of its powers as restricted by the constitution, it follows that the case must be dismissed for want of jurisdiction.

FAUNTLEROY, J., and RICHARDSON, J., dissented.

APPEALS DISMISSED.

Richmond.

SUPERVISORS OF STAFFORD COUNTY v. LUCK.

FEBRUARY 12th, 1885.

1. **CONTRACTS**—*Legislative acts—Repealable.*—Act of February 9th, 1882, empowering supervisors of Stafford county to build a bridge across Rappahannock river, and commissioners appointed by the county judge to manage it after its erection, is simply a grant by the State of certain privileges for public purposes, and contains none of the elements of a contract.
2. **IDEM.**—Therefore the act of March 18th, 1884, virtually repealing that act, does not impair the obligation of any contract with those supervisors, or with those commissioners, or assail any vested rights, and is not unconstitutional and void

Appeal from decree of circuit court of Fredericksburg, entered July 21st, 1884, in the causes of the Board of Supervisors of Stafford county against Brown, Lowndes & Co., and of Luck and others against Board of Supervisors of Stafford county. The latter suit was instituted by Luck and other tax-payers of said county to enjoin the said supervisors from levying a tax, in advance of issuance and negotiation, to pay the interest on county bonds which were necessary to be issued and negotiated in order to raise funds to pay for erecting the free bridge across the Rappahannock river near Fredericksburg, under act of February 9th, 1882. The former suit was instituted to compel the defendants specifically to perform their contract with the supervisors to purchase twenty-four of said bonds, each being for the sum of \$1,000, at certain agreed rates. The circuit

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court decided both causes against the supervisors, enjoining the levy of the said tax in the one, and refusing to decree specific performance of the contract in the other.

From that decree the supervisors obtained an appeal to this court.

Opinion states the remaining facts.

John T. Goolrick, Jos. Christian, and F. S. Blair, for the appellant.

Little & Little and Marge & Fitzhugh, for the appellees.

LEWIS, P., delivered the opinion of the court.

In the argument of the case, a number of questions were discussed by counsel, which need not be considered by the court. The case lies within a narrow compass, and may be briefly disposed of.

It is very clear that the bridge commissioners, whose appointment is provided for by the act of February 9th, 1882 (Acts 1881-'82, page 66), must be regarded merely as local agents of the State. The act does not invest with any rights of property in their individual or private capacities. The object of their appointment was essentially and exclusively public—namely, the erection and management of a bridge across the Rappahannock river to connect two of the counties of the State for the public convenience. They, therefore, stand towards the State, so far as the present case is concerned, in the same attitude as the supervisors of Stafford county, a public *quasi* corporation, who are charged by the act with the duty of building the proposed bridge, when petitioned to do so by the requisite number of voters of the said county, and who are empowered by the act to borrow money to defray the necessary expenses attending its construction. In other words, the su-

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pervisors are charged with the duty of building the bridge and levying taxes to meet the loans to defray the expenses thereof, and the commissioners are charged with the duty, under the direction of the county judge, of controlling and managing it, after its erection, "in the interests of the said county and such other county and districts or corporation as may subscribe," &c. In no just sense, then, can it be said that a *contract* was entered into by the State, on the one hand, and the supervisors and commissioners on the other, by the passage of the act under which the latter were appointed, or by anything that has since occurred. The act is simply a grant by the State of certain privileges for public purposes, containing none of the elements of a contract, and therefore subject to be changed or repealed altogether as the Legislature may see fit. These propositions are well-established and incontrovertible. The authorities upon the subject are numerous and unanimous. The question was elaborately considered by the supreme court of the United States in the case of *East Hartford v. The Hartford Bridge Company*, 10 How. 511, in which it was held that a law granting to the town of East Hartford the right to keep a ferry across a public river, did not constitute a contract between the State and the town, so as to preclude the legislature from revoking the grant. In delivering the unanimous opinion of the court, affirming the judgment of the supreme court of Connecticut, Mr. Justice Woodbury said: "The parties to this grant did not by their charter stand in the attitude towards each other of making a contract by it, such as is contemplated in the constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be con-

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sidered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature. They are incorporated for public, and not for private objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached and levied on for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes. It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies. * * It is as much the duty of the legislature to continue to regulate such public matters and bodies as to organize them at first. Where not restrained by some constitutional provision, this power is inherent in its nature, design and attitude; and the community possess as deep and permanent an interest in such power remaining in and being exercised by the legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance, possess in restraining it."

In *Laramie County v. Albany County*, 92 U. S. 307, it is said that except where the constitution of the State otherwise provides, municipal corporations, such as counties, cities, and towns, are the mere creatures of the legislative will; and inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent or even without notice.

* * Their officers are nothing more than local agents of the

State; and their powers may be revoked or enlarged, and their acts may be set aside or confirmed, at the pleasure of the paramount authority, so long as private rights are not thereby violated. See also *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Maryland v. The B. & O. R. R. Co.*, 3 How. 534; *Meriwether v. Garrett*, 102 U. S. 472; *Mayor, &c. v. Sehner*, 37 Md. 180; *Wade v. City of Richmond*, 18 Gratt. 583; *City of Richmond v. R. & D. R. R. Co.*, 21 Id. 604; *Lewis v. Whittle*, 77 Va. 415; 1 Dillon on Munic. Corp. (3rd ed.), sections 63, 114, and cases cited.

After the institution of the present suit, the act of February 9th, 1882, was amended by an act in force March 18th, 1884, Acts 1883-'84, page 697. The amendatory act provides that it shall be the duty of the county court of Stafford, when petitioned by fifty voters of said county, one-half of whom shall be freeholders, to cause a vote of the voters of the county to be taken upon the question of authorizing the supervisors to build a bridge across the Rappahannock river at or near the town of Fredericksburg. And, among other things, it further provides, that notwithstanding the vote be determined in favor of building the bridge, the commissioners shall have "full power to buy or lease either or both of the existing bridges at Fredericksburg or Falmouth instead of building such bridge."

This act virtually repeals the act of February 9th, 1882, and is assailed as impairing vested rights, and therefore as unconstitutional and void. This objection, however, made as it is by the supervisors of Stafford and the bridge commissioners only, who are the appellants here, is conclusively disposed of by what has already been said. No other persons are complaining, nor does it appear that there are any whose rights have been violated, and who have cause of complaint. The appellees, Brown and Lowndes, with whom the board contracted for the sale of certain county bonds to be issued, are not only not complaining, but strenuously insist that the contract is void, and cannot, therefore, be enforced at law or in equity.

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But if it be true that third persons have been injured, the law provides ample remedies for the assertion and vindication of their rights. It is certain that the appellants have no cause of complaint, and the decree of the circuit court must therefore be affirmed.

DECREE AFFIRMED.

Richmond.

FONTAINE'S ADM'R v. THOMPSON'S ADM'R.

FEBRUARY 12th, 1885.

1. WILLS—*Devise—Valid as to class—Void as to individuals.*—"Item. I give to my brother W. all the residue of my estate, to be held by him in trust, and to be distributed among my next of kin *who may be needy*, in such proportions and at such times as in his opinion may be best; and I do authorize him to so dispose of my estate either in kind, or to sell and convert into money." W. was named as executor in the will, but died before qualifying. The administrator *d. b. n. c. t. a.* brought suit to construe the will.

HELD:

1. The devise is valid as to the class, "*the next of kin*," but invalid for uncertainty as to the individuals to be selected "*the most needy*."
2. The residue of the estate must be divided among the next of kin according to the statute of descents and distribution.
3. W. is entitled to share in that residue as one of "*the next of kin*."

Appeal from decree of the circuit court of Pittsylvania county, entered December 22nd, 1882, in two suits therein heard together, of Thompson's adm'r against Fontaine's adm'r, and Terry against Thompson's adm'r—the first being brought to construe the will of Tabitha M. Thompson, deceased, and the last to subject the interest of her brother, William Fontaine, in her estate, to the claims of his creditors.

Opinion states the case.

Carrington & Fitzhugh for the appellants.

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J. D. Cōles, Green & Miller, and L. Scruggs for the appellees.

LACY, J., delivered the opinion of the court.

On the 23rd of February, 1882, Thompson's administrator instituted a chancery suit in the said court, alleging that his testatrix, Tabitha M. Thompson, had departed this life, leaving the following will:

"First. I desire my debts to be paid out of such part of my estate as my executor shall think best. Second. I give to my brother, William Fontaine, all the residue of my estate, real and personal, to be held by him in trust, and to be distributed among my next of kin *who may be needy*, in such proportions and at such times as in his opinion may be best; and I do authorize him to so dispose of my estate either in kind, or to sell and convert into money. I hereby appoint my brother, William Fontaine, my executor, vesting him with full discretion in the control and disposition of my estate as above directed, and for his trouble he is to be allowed such compensation as he may think reasonable over the usual commission; and I request that he may be allowed to qualify and act without being required to give security."

That the said executor named in the will died without qualifying, and the estate of the said Tabitha M. Thompson had been committed to the said complainant as sheriff, to be administered with the said will annexed, and submitted to the court the true construction of the said will for his guidance and instruction; that he had no interest in the result of the said construction, but the same was only asked that he might act advisedly as such administrator.

That the testatrix died without issue, leaving as her heirs at law the said William Fontaine, named executor in the will, her brother; the children and grandchildren of her brother, Thomas B. Fontaine; the grandchildren of Robert Fontaine, a brother of the testatrix; the children and grand-

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children of Elizabeth Beavers, deceased, a sister of the testatrix; who were made parties to the suit by themselves or their legal representatives. The adult defendants answered claiming that the provisions of the will were void for uncertainty as to the designated class of the most needy, &c., and that the estate passed as provided by the statute of descents to be distributed among the next kin. The infant defendants answered formally by guardian *ad litem*.

On the 23rd of February, 1882, one Harvey Terry filed his bill against Thompson's administrator and the defendants named in the suit of Thompson against Fontaine, claiming to be a judgment creditor of William Fontaine, and claiming that the will was valid, and that the whole estate passed to William Fontaine thereunder; but that if the will was invalid, and so held by the court, then the said William Fontaine was as next of kin entitled to receive one-fourth of the said estate; and praying that the said interest might be subjected to the payment of his debt. To this bill Thompson's administrator and some of the defendants in the first suit demurred.

On the 22nd of December following the causes came on to be heard together, upon the pleadings stated and the exhibits filed, when the court held that the true construction of the will of Tabitha M. Thompson was to make William Fontaine, the executor named therein, a trustee of the real and personal property in the will devised for the heirs and distributees, according to the Virginia statute of descents and distribution, of the said Tabitha M. Thompson, deceased, excluding therefrom the said William Fontaine, nominated as executor and trustee in the said will—ordered a sale of the property for distribution according to the said decree, and overruled the demurrers to the second bill, but dismissed the same upon the ground that William Fontaine had no interest in the estate of Tabitha M. Thompson, except the right to qualify and receive compensation for his services, and this he had not done, but had died without so doing.

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From this decree the administrator of William Fontaine, and the said Harvey Terry, applied for and obtained an appeal to this court.

In this case the testatrix devised her estate in trust to be distributed among her next of kin who may be needy, in such proportions and at such times as in the opinion of the trustee might be best. The trustee did not qualify, and died; the trust, however, will not be allowed to fail for want of a trustee, and as to the beneficiaries who are to take under the will, the intention of the testatrix will be effectuated, if it can be done consistently with the rules of law. There is certainly no reason why the devise should be held to be void on the ground of the uncertainty of the class which is to take. The distribution is to be among her next of kin; that much is distinct and clear enough; the persons to be benefitted are the *most needy* in that class (designated as her next of kin), according to the opinion of the trustee.

If the persons to be selected out of this class cannot be determined for any cause, then the selected persons will not take, because they are unknown; but the class being clearly and distinctly designated, out of which the selection was to be made, there is no reason why the devise should be declared void as to the class, although it might be void as to the person to be selected out of the class, because of uncertainty. The courts have passed upon these words, "the most needy," or their equivalent, in cases which we have examined, and they do not seem to have taken the same view of the question in every case. In *Frazier v. Frazier*, 2 Leigh 642, this court held the words "to be distributed by the brother among the next of kin, according to their deserts, as he should see at a future time what may turn up," to pass no estate, and the testator to be regarded intestate as to this subject. This case was decided in 1831. In 1830, the supreme court of errors of Connecticut, in the case of *Bull v. Bull*, 8 Conn. 47, took what seems to be an opposite view, holding that "it can be ascertained who are the most

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needy of the brothers and sisters and their children," so stating a similar devise in that case as in this.

We have been referred to *Hill v. Bowman and wife*, in 7 Leigh 650, as a decision of this court overruling the decision in *Frazier v. Frazier*, *supra*, but, as opposing counsel argued in this court, *Frazier v. Frazier* is not mentioned, nor referred to, directly or otherwise, in the latter case, which was decided in the same court five years after the first case; and, as the two cases show, the same counsel represented the appellant and assigned the errors in both cases, and they are reported by the same reporter.

But an inspection of the case shows that the court sustained the trust in that case for the benefit of the testator's family and other persons who may be in distress, and whom they may think he would have assisted, confiding the execution of the trust entirely to the trustees, upon the ground that "*members of my family*" were considered words of sufficient certainty; the opinion of the court saying: "No authority in point has been produced to show that a declaration of trust, in favor of certain definite objects of the testator's bounty, is avoided because in the same clause there is a limitation to persons incapable of taking, or because there is a limitation to persons not certain and ascertained."

Holding that the devise to testator's family, or for their benefit, was good and valid, although other persons, not ascertained or determined, were referred to; and it will be remembered that in the case of *Frazier v. Frazier* this was the substantial result; there the devise was for the benefit of the testator's next of kin, to be selected by a rule held to be too uncertain and void, but the devise was in effect sustained as to the class ascertained and certain, to-wit, the next of kin.

Up to this point we think the decision of the circuit court is correct. But having sustained the trust, and held it to be valid as to the next of kin, and void for uncertainty as to the selected persons, "the most needy," the court goes on to ex-

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clude some of the next of kin as not within the benefit of the provision; that the brother, William, who was named as the trustee and executor, could take nothing, and was to be excluded.

We do not think this is so clear. The ground for the exclusion is that he was named trustee; but we find no express words which exclude him from the express designation in the will of, "my next of kin," wherein it is admitted he is included—the estate is devised for the benefit of her next of kin; he is of her next of kin, and the nearest relation she has living at the time of her death, and, as the will shows, the most trusted. We think he ought not to be excluded, unless by the force of plain words, which are not to be found in the provision directing him to make distribution, &c., or appointing him trustee. Under some circumstances it might be made a ground for a change in the person of the trustee, but the party once coming within the designated class, without plain and express words to exclude him, should not be excluded—as has been held in a case where the devise was to a brother to be divided among *one* brothers and sisters. The court held that he was excluded by the word *one*. He could not be his own brother. But in another case, the testator having provided that his son William should take his plantation at \$65 per acre, pay his debts, pay \$1,000 to the widow, "then the balance to be equally divided amongst my children," and then designated the children by name, as to when they should receive their respective shares, but not ascertaining the amounts. The court held that William, the devisee of the land, was entitled to a share of the proceeds in common with the other children, and that the direction to him to pay was not inconsistent with the idea of retention by him of a portion of the fund. *Heunershotz's estate*, 4 Harris 435; see also *Gorder v. Mainwaring*, 2 Vesey 87, opinion of Lord Hardwicke; Perry on Trusts (3rd. ed.), Vol. 1, section 255; Hill on Trustees, page 492.

But it is unnecessary to multiply cases. Every case in the

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construction of a will must depend in a great degree, of course, upon the terms of the instrument under consideration. In this case, if we are unable to follow the court in *Bull v. Bull*, and ascertain the most needy, we find no difficulty in discovering the class named, the next of kin of testatrix; and we see nothing in the will to exclude the brother from the next of kin. We think he is entitled to share with the others, and the decree of the circuit court must be reversed and annulled, in so far as it held the brother excluded.

The decision of this question decides in effect all other questions raised, and it is not necessary to further refer to them.

The decree was as follows:

This day came again the parties, by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the argument of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court of Pittsylvania did not err in its decree of December 22nd, 1882, appealed from here, in so far as it decided that the true construction of the will of Tabitha M. Thompson, deceased, was to make and constitute William Fontaine, named therein, a trustee of the real and personal property, in the will devised, for the heirs and the distributees of the said Tabitha M. Thompson, deceased.

But in so far as the said decree held that William Fontaine was excluded from the benefits derived under the said will, the court is of opinion that the said decree is erroneous.

And the court is further of opinion that said decree of the circuit court is erroneous in dismissing the bill filed by the appellant, Harvey Terry, and that said bill should have been entertained as a creditors' bill, and the demurrers thereto overruled.

It is, therefore, decreed and ordered that the said decree of 22nd December, 1882, be reversed and annulled, so far as it

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held the said William Fontaine to be excluded from the benefits of the said will, and so far as it dismissed the bill of the appellant, Harvey Terry. And these causes are remanded to the said circuit court of Pittsylvania with instructions to proceed therein in accordance with the foregoing opinion of this court and the views herein.

And it is further decreed and ordered that the appellee, Thompson's administrator, out of the assets of his testatrix, in his hands to be administered, do pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here; which is ordered to be certified to the said circuit court of Pittsylvania.

DECREE AFFIRMED IN PART AND REVERSED IN PART.

Richmond.

CITY OF LYNCHBURG v. N. & W. R. R. Co.

FEBRUARY 19th, 1885.

1. MUNICIPAL CORPORATIONS—*Powers of taxation*.—Every grant of the power of taxation to a municipal, or other subordinate body, must be strictly construed. And municipal officers must show, in the words of the charter, a warrant for whatsoever authority they assume to exercise.
2. IDEM—*Idem*.—Section 5, of charter of city of Lynchburg, grants authority to impose a license tax upon persons engaged in certain enumerated callings, and "upon any other person or employment, which it may deem proper, whether such person or employment be herein specially enumerated or not," does not empower the city to impose such tax upon a railroad corporation; which is neither a person nor an employment, within the ordinary acceptance of those words.
3. CONSTRUCTION—*Rule of ejusdem generis*.—When a particular class of persons or things is spoken of in a statute, and general words follow, the class first mentioned must be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class, the effect of general words when they follow particular words being thus restricted.

Error to judgment of corporation court of city of Lynchburg, rendered September 8, 1884, in an action of *assumpsit* wherein the Norfolk & Western Railroad Company was plaintiff, and said city was defendant.

The city, under section 5 of its charter (Acts 1879–80, pages 109–10), imposed a specific license tax of \$1,000 on the said company. The latter brought this action to recover the amount which had been paid under protest. The corporation court gave

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judgment in favor of the plaintiff, and the defendant was allowed a writ of error and *supersedeas* by one of the judges of this court.

Kean & Kean, for the plaintiff in error.

By reference to the existing charter of the said city (Acts 1879-80, pages 98 to 113), under which the proceedings complained of were had, it will be seen that by chapter 8, sections 3, 4 and 5 of said chapter (pages 109-10), the council of the said city is clothed with very large and comprehensive powers of taxation, "for the execution of its powers and duties under this charter."

By section 3, power is given to tax every imaginable species of property, real and personal, including choses in action, capital employed in business, stocks in incorporated companies, incomes, interest on money, and dividends.

By section 4, power is given to lay a poll-tax of fifty cents per head on male residents of the city over twenty-one years of age.

By section 5, power is given to impose a tax "on merchants, commission merchants, auctioneers, manufacturers, traders, professional men, as lawyers, physicians, dentists, on brokers, keepers of ordinaries, hotel keepers, boarding-house keepers, keepers of drinking or eating houses, keepers of livery stables, daguerrean artists of all kinds, agents of all kinds (including the agents of foreign insurance companies whose principal office is not in the city), sellers of wine and other liquors, venders of quack medicines, public theatrical or other performances or shows, keepers of billiard tables, ten-pin alleys, pistol galleries, hawkers, pedlars, sample merchants, and upon any other person or employment which it (the council) may deem proper, whether such person or employment be herein specially enumerated or not, and whether any tax be imposed thereon by the State or not. As to all such persons or employments, the council may

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lay a direct tax, or may require a license therefor under such regulations as it may prescribe, and levy a tax thereon.”

When, after the enumeration of the various subjects which might be reached by direct or license taxes, the general assembly added the comprehensive words: “and upon any other person or employment which it may deem proper,” &c., the added phrase, “which it may deem proper,” &c., shows that the legislative purpose was to *enlarge* the grant by making the judgment and discretion of the council a legislative body of large and varied powers,—the only limitation, except those expressly stated.

The decision of the judge of the corporation court went wholly upon the ground that, where a particular class of things is spoken of in the statute, and afterwards general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class; citing Broom’s Maxims (651); Porter’s Dwaris, 236; 2 B. & Adol. (22 E. C. L.), 592 (249); 14 E. C. L. 52; 49 Mo. 559.

That railroads are not mentioned at all; that they would have constituted, or might have constituted, a much more important subject of taxation than hawkers, pedlars, or shows, venders of patent medicines, or ten-pin alleys, and therefore it is not to be presumed or considered that the legislature intended that the general and comprehensive words were intended to embrace them, or any subject not of the same nature, with some one or more of the enumerated classes.

This reasoning and the conclusion based upon it are unsound. Nobody questions the general truth of the rule relied on, when it is justly applicable, as in cases where the enumerated subjects themselves are of an analogous nature. These rules of interpretation have been established as means to aid in *ascertaining* the *intention*. They do not control the intention. The practical difficulty is in correctly applying them.

If the legislature had contented itself with the enumeration

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in section 5, followed by words and "any other person or employment," there might have been some show of force in the application of the rule of construction which was applied by the court below. Even this may well be doubted in its application to city charters, where the powers are exercised by councils. In a charter, which after an enumeration, had the words "all other persons exercising within the city any profession, trade or calling, or business of any nature whatsoever," a city may tax chartered banks. *Macon v. Macon Savings Bank*, 60 Ga. 133.

And a city having authority to license, tax and regulate "merchants, &c.," may impose an *ad valorem* tax on the gross receipts of an insurance company. *Am. U. Ex. Co. v. St. Joseph*, 66 Mo. 675.

But the legislature did not stop with those words, and as if sensible that to do so might give occasion for an unreasonable, and not intended restriction on the taxing power of the city, the charter goes on to qualify them by terms which enlarge them still further, by showing that a legislative discretion was intended to be vested in the council by the words, "*which it (the council) may deem proper.*" Not content with this phrase, which, standing alone, might possibly be construed as importing only a discretion to tax such subjects analogous to those enumerated, as the council might see fit to select, the law proceeds with words unmistakably enlarging their effect and meaning, and which could have been used for no other purpose, "whether such person or employment be herein specially enumerated or not." And not content even with this, but apparently to take away any doubt which might possibly be raised, on any ground whatever, and to make the taxing power co-extensive with that of the State herself, as to that general class of subjects which cannot be reached by the *ad valorem* system, it adds the further enlarging words, "whether any tax be imposed thereon by the State or not."

Thus by carefully selected language, the rule of *ejusdem gen-*

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cris is excluded, and the *intention* of the legislature (which is the real thing to be ascertained) is manifested. The power to tax by way of license or direct tax, all and every person or employment, in said city, is given in the amplest manner.

(1.) A moderate and reasonable tax on the business done by the railroad company at Lynchburg is reasonable and just.

The company has large and valuable properties there, and as a great carrier of merchandise has vast values, for which it is responsible, constantly under the protection of the city police and the fire department. These considerations of natural justice were strongly dwelt on by this court in *Humphries v. The City of Norfolk*, 25 Gratt. 102-3. In that case the foreign insurance companies were resisting municipal taxation on grounds in some respects analogous to those urged here; such as want of power under the charter of the city; implied exemption from the manner of taxation by the State, &c. (see pages 100-101); all of which were overruled by the court. At the place first above cited, this court said:

"They" (the insurance companies) "derive their chief revenue from the towns; within whose limits the principal offices and agencies are located; the lives and buildings they insure are under the protection of the municipal authorities; *the fire departments which secure dwellings from conflagration*; the police which guard the life of the citizens against violence, and all the varied and expensive sanitary regulations which promote health, * * operate undoubtedly to the advantage of the insurance companies. Are they to enjoy the benefits of good government without contributing in any degree to its expense? Are they alone to be exempt from those common burdens which devolve upon all the inhabitants of towns and cities?"

This court unanimously held the license-tax imposed by Norfolk on the foreign insurance companies having agencies in that city, valid and just.

(2.) It is urged in argument, and to some extent relied on by the court, that "the power to tax is the power to destroy;"

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that the power to tax to destroy the railroad property is the power to destroy the commerce of the State. The answer to this is manifold.

(a.) The interest of the railroad companies and of the cities to or through which their roads pass are largely identical. Prosperity, growth, and the development of trade and wealth in the cities means increased traffic to the roads, and reciprocally the larger the volume of traffic conducted or induced by the railroads at a city the greater the benefit to the city.

(b.) If the power should be abused by oppressive taxation the evil could and would be corrected by the voters, who would choose a council of more enlightened and just opinions.

(c.) All municipal powers are under the direct and constant control of the legislature. A power which, should it be abused, would be promptly limited or taken away.

(d.) This court has furnished a direct answer to this point in *City of Richmond v. Danville R. R. Co.*, 21 Gratt. 615-16. After quoting Ch. J. Marshall (4 Pet. 514) to the effect that no argument against the power of taxation can be drawn from its liability to abuse, this court said: "The power of taxation itself and the right of eminent domain may be perverted to purposes of injustice, but this *possible abuse* furnishes no argument against their exercise within reasonable limits and with a due regard to private rights."

(3.) Great judges have several times in recent years found occasion to warn the profession against a tendency to impute a "public policy" to the State, which has not been declared by the constitution, the statute law, or the decisions of the highest courts. Story J., in the Girard Will Case, 2 How. 198, often approved of in this court; Chase Ch. J., 5 Wall. 469; Field J., 5 Wall. 111-12.

There is no statute law of this State, nor any known decision which indicates, much less establishes as a public policy in Virginia, looking to the exemption of railroad companies from taxation, State or municipal. On the contrary, in a few of the

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earliest charters granted, such exemption was expressly made, by way of encouragement to infant enterprise; in the later ones it has been uniformly withheld, and in some of those which originally contained it the legislature has made its renunciation the condition on which amended charters sought by the company have been granted.

(4.) Exemption from taxation cannot be implied. As the power to tax must be shown to exist—and is a sovereign power—so whenever it does exist, exemptions must be shown clearly and unequivocally to have been conferred by the grant of the sovereign authority. The claim of *exemption* is to be as strictly construed as the imposition of the tax. *Westchester Fire Ins. Co. v. Davenport*, 91 N. Y. 574; *O. & A. R. R. Co. v. Alexandria*, 17 Gratt. 184; *R. R. Co. v. Commissioners*, 103 U. S.: 1 *Pierce on Railroads*, 478-9; *R. R. Co's. v. Gaines*, 97 U. S. 697; *Richmond v. Danville R. R. Co.*, 21 Gratt. 613-14.

And this case shows further that an express exemption from State taxation carries no implication that exemption from municipal taxation was intended. See also *Humphries v. Norfolk*, 25 Gratt. 100; *West'n U. Tel. Co. v. Richmond*, 26 Gratt. 1 (page 22); *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, and a multitude of cases collected—3. Am. and Eng. Corp. Cas. 414.

(5.) Effort is made to found an argument against the power of the city to assess this tax on the descriptive words of the charter, "persons or employments." It is said that railroad companies are not "persons" and that their business is not an "employment" in the sense of the law.

The reply to this is also manifold:

(a.) The Code of 1873, chapter 15, section 9, on the construction of statutes, "provides (page 195), the word 'person' may extend and be applied to bodies corporate and politic as well as individuals."

(b.) This provision has been construed by this court, "When the word 'person' is used in a statute, corporations as well as natural persons are included for civil purposes." *B. &*

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O. R. R. Co. v. Gallahue, 12 Gratt. 655; reiterated in respect to a municipal tax law, *W. U. Tel. Co. v. Richmond*, 26 Gratt. 20.

(c.) The Code, chapter 34, section 1, page 319, defines the subjects of license taxes as "any citizen of this State, any person entitled to the privileges of citizenship in this State, or residing in it, any firm or company doing business in it, any corporation created by this State, or any of the United States, or any other person on whom a license tax shall be specially imposed;" and by chapter 54, section 32, page 528, cities and towns are authorized to impose license taxes in the cases mentioned in the 34th chapter, in which licenses are required by the State. This would make the city levy fluctuate with the State tax bill. Hence the provisions of the charter, section 5, chapter 8, were made as broad as they are there seen to be, and independent of the annual State tax bill, "whether taxed by the State or not."

The provisions of chapter 54 are cumulative to the charters of cities, except when inconsistent with sections 39-46; charter of Lynchburg; Acts '79-'80, page 113, section 11; page 98, chapter 1; *Ould & Carrington v. Richmond*, 23 Gratt. 470.

(6.) It has been the customary mode of taxing railroads in Virginia, for many years to tax them upon their gross receipts. Acts 1859-'60, chapter 1, section 58; Code of 1860, page 200, section 58.

The recent method by assessment of their entire property through the board of public works, for State and county purposes, was probably induced by the pendency of the suit of *Va. & Tenn. R. R. Co. v. Washington Co.*, 30 Gratt. 471.

It was first passed March 13, 1877, as to the State, and extended to the counties by the act of 27th February, 1880. None of these acts apply to the cities. They leave them to proceed on their own way according to the powers conferred in their charters. No valid reason can be assigned why the counties should be empowered to levy taxes on railroad companies (Acts

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1879-'80, page 82), for county purposes, while the cities should be debarred of revenue from that source. On the other hand there is a plain reason why specific provisions should be made in favor of the counties and none in respect to the cities, found in the fact that the boards of supervisors have no legislative powers, while the councils of cities have, and are thereby enabled to establish and maintain, adjust and modify, a fiscal system. The want of this power was one point on which the decision in the Washington county case rests. It was decided in July, 1878, and the act of 27th February, 1880, above cited, was passed by the next session of the legislature to supplement this ascertained defect of power. (Compare 30 Gratt. 471, 25th July, 1873, and act 27th February, 1880, Acts 1879-'80, page 82, and the connection between the two becomes apparent.)

Kirkpatrick & Blackford and *John W. Daniel*, for the defendant in error.

1. A railroad is an entirety, and cannot be spoken of as actually located in any county, city, or town, which it traverses or touches.

2. The powers of municipal bodies are delegated, and must be strictly construed,—especially when they relate to taxation.

3. "If it is not manifest that there has been a purpose by the legislature to give authority for collecting a revenue by taxes on a specified occupation, any exaction for that purpose will be illegal." (Cooley on Taxation, 387).

4. The intention of the legislature to authorize a burden to be imposed must be explicitly and distinctly shown; when there is any ambiguity found, the construction must be against the power.

5. Where particular words are followed by general ones, the latter are to be held as applying to persons and things of the same kind with those which precede.

6. Public policy should be looked to as indicative of legisla-

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tive intent; and when a fixed policy has been long pursued by the State, no radical change therein will be presumed, unless set forth in very explicit terms.

7. A railroad merely touching *at* Lynchburg is not "a person or employment" *in* the city of Lynchburg, within the meaning of its charter.

HINTON, J., delivered the opinion of the court.

The sole question in this case is, whether the city of Lynchburg has the power under its charter, to assess a railroad corporation with a license tax. By section 3, of chapter 8, of said charter, the council is given the power to tax all corporations located in the city, or having their principal office therein: and all real and personal property in the city not exempt by law from taxation. And it is admitted, that under the second of the above recited provisions, the city taxes all of the real and personal property of the defendant company within its limits.

Section 5, of the same chapter, reads as follows: "The council may impose a tax on merchants, commission merchants, auctioneers, manufacturers, traders, lawyers, physicians, dentists, brokers, keepers of ordinaries, hotel keepers, boarding-house keepers, keepers of drinking and eating houses, keepers of livery stables, daguerrean artists of all kinds, agents of all kinds, (including the agents of insurance companies whose principal office is not located in the city), sellers of wines and other liquors, venders of quack medicines, public theatrical or other performances or shows, keepers of billiard tables, ten-pin alleys, pistol galleries, hawkers, pedlars, sample merchants, *and upon any other persons or employment which it may deem proper, whether such person or employment be herein specially enumerated or not, and whether any tax be imposed thereon by the State or not.*"

And, it is under the concluding words of this section, which we have italicized, that the right to impose the tax in question is claimed. The real inquiry of the court, therefore, is to as-

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certain the meaning of the legislature as expressed in these words.

And, in the prosecution of this purpose, we must bear in mind the well settled rule that, every grant of the power of taxation to a municipal or other subordinate body must be strictly construed. Upon this point, a learned writer has said: "In the construction of any grant of the power to tax made by the State to one of its municipalities, the rule accepted by all the authorities is, that it should be with strictness. The reasonable presumption is held to be, that the State has granted in clear and unmistakable terms all it has intended to grant: and whatsoever authority the municipal officers assume to exercise, they must be able to show a warrant for it in the words of the grant." Cooley on Taxation, 209; and to the same effect are the cases in this State. See *City of Richmond v. Daniel*, 14 Gratt. 387; *Orange & Alexandria R. R. Co. v. Alexandria*, 17 Gratt. 184; *Virginia & Tennessee R. R. Co. v. Washington county*, 30 Gratt. 474.

Now it is undeniably true that, for civil purposes, corporations are deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in the statute. *Baltimore & Ohio R. R. Co. v. Gallahue's adm'rs*, 12 Gratt. 663; and perhaps, under our Code, chapter 15, section 13, page 195, which provides that the word person may extend and be applied to bodies politic and corporate as well as individuals, that the word "person" must be held to embrace, even in statutes which confer the power of taxation, artificial as well as living beings, unless there be something in the subject matter, object, words or frame of the act, indicating that such was not the purpose of the legislative mind. *Western Union Tel. Co. v. Richmond city*, 26 Gratt. 1; *Miller's executors v. Commonwealth*, 27 Gratt. 110. This, however, is not the ordinary sense in which this word is used, and it cannot be denied that in its usual and common acceptance it does not extend to corporations. It is equally true

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that the word "employment" in its ordinary and natural acceptation does not extend to or include either a railroad corporation or its business. In the case of *The City Council v. Lee*, 3 Brev. R. 227, Nott, J., in discussing the question whether a tax "on all profits or income arising from the pursuit of any faculty, profession, occupation, trade or employment" included the salaries of public officers, said: "The word 'employment' is the only word under which it is pretended that they can be included. I do not know," says he, "that this word is anywhere used as a technical term. It is a common word, generally used in relation to the most common pursuits, and, therefore, ought to be received by this court as understood in common parlance;" and so we think it must be understood in this case. If, therefore, the words "persons" and "employment," used in this statute, are to be taken according to their natural import, it will be at once seen that they cannot be held to comprehend a railroad corporation, which is neither a person nor an employment within the ordinary acceptation of those words. Nay, more, if we shall find no language in the statute indicating that these words were used with reference to a higher and different class of persons and employment than those enumerated in the preceding special words, we must construe the words "persons" and "employment" as applicable to persons and employments *ejusdem generis* with the enumerated classes: for the well established rule in the construction of statutes is, that where particular words are followed by general ones, the latter are to be held as applying to persons and things of the same kind with those which precede; Potter's Dwarrris, 236; which means no more, as has been acutely observed by a learned judge, than this, that the law should be construed according to the apparent intention of the legislature, to be gathered from the language used, connected with the subject of legislation, so that its terms shall not be extended by implication beyond the legitimate scope or import of the words used. Wagner, J., in *City of St. Louis v. Laughlin*, 49 Mo. 563.

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But it has been argued with great power and ability that these words, when taken, as they must be, in connection with the words which follow them, are broad enough to include railroad corporations, and plainly manifest an intention on the part of the legislature to exclude the application of the rule of *ejusdem generis* from this statute. Such, however, does not seem to us, after a careful consideration of the terms of the statute, to be the case. For the words "which it may deem proper," taken in the connection in which they are found, do not seem to be entitled to any special significance. They do indeed confer in express terms a discretion which the council would doubtless have had if they had been entirely omitted. But that discretion, far from enlarging and elevating the power of the council, in the matter of taxation, to subjects of a higher degree, really imports a discretion in the council to tax only such subjects analogous to the enumerated classes as the council may see fit to select. And whilst the obvious import of the words "whether such person or employment be herein specially enumerated or not, and whether any tax be imposed thereon by the State or not," is to extend the power of the city to tax other persons and employments than the enumerated classes, regardless of whether they are taxed by the State or not, it cannot be said to necessarily convey the idea that these new taxable subjects shall be different in character or higher in degree.

After a careful examination of the act, we are unable to discover anything which clearly indicates an intention on the part of the legislature to confer upon this municipal council the power to tax railroad corporations under cover of these general words.

We must, therefore, hold, in accordance with the uniform current of authority, that the general words here used are restricted to such persons and employments as may be analogous to those previously mentioned.

In *Sandiman v. Breach*, 7 Barn. & Cres. 96, the words "other
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person or persons" was held not to have been used in a sense large enough to include the owner and driver of a stage-coach. In *Casher v. Holmes*, 2 Barn. & Adolp. 596, the words "all other metals," were held not to include gold and silver, which are precious metals. In *Rex v. Cleworth*, 4 B. & S. (116 E. C. L.) 927, a farmer was held not to be within the statute 29 Car. 2, chapter 7, section 1, which enacts that no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business or work of their ordinary callings, upon the Lord's day or any part thereof," &c. In Butler's appeal, 73 Penn. St. R. 452, the clause "also, all other places of business or amusement conducted for profit," were held not broad enough to embrace bankers, brewers or druggists. And in the *City of St. Louis v. Laughlin*, 49 Mo. 564, the sweeping words "all other business, trades, avocations or professions whatever," were held not to include persons not of the same *generic* character or class with the specifically enumerated classes, and hence the city of St. Louis had no power to pass an ordinance levying a tax on attorneys at law. See also, Broom's Legal Maxims, 7 Ed. 651.

The judgment of the corporation court of the city of Lynchburg is right and must be affirmed.

JUDGMENT AFFIRMED.

Richmond.

HUTCHESON v. GRUBBS.

FEBRUARY 19th. 1885.

1. JUDGMENTS—*Decrees—Judgment creditors.*—By Code 1873, chapter 182, sections 1 and 2, a decree for specific property or requiring payment of money, has the effect of a judgment, and persons entitled thereto are judgment creditors.
2. PRACTICE IN CHANCERY—*Statute of limitations.*—Courts of equity follow the law as respects the statute of limitations. If a legal claim, barred at law, be asserted in equity, it is equally barred there.
3. JUDGMENT LIENS—*Enforcement in equity.*—Lien of judgment is a creature of statute, and cannot be enforced in equity after it ceases to be enforceable at law.
4. IDEM—*Construction of statutes.*—The language of the statute, Code 1873, chapter 182, section 9: "The lien of a judgment may always be enforced in a court of equity," implies only a purpose to confer jurisdiction on courts of equity to enforce the lien, whether the remedies at law are adequate or not.

Appeal from decree of circuit court of Mecklenburg county, entered by the judge thereof, in vacation, on 26th March, 1883, in two chancery suits, in one whereof Rebecca A. Grubbs' administrator was plaintiff, and Charles S. Hutcheson's executrix and others were defendants, and in the other whereof said C. S. Hutcheson and R. M. Hutcheson, commissioners, were plaintiffs, and John W. Richardson was defendant.

The object of the suits was to enforce on certain land the liens of certain decrees which were rendered in 1863, for the payment of money, whereon no executions were ever issued. The defendants plead the statute of limitations. The decree

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being in favor of the plaintiffs, the defendants obtained an appeal to this court.

W. W. *Henry* and *Finch & Atkins*, for the appellants.

Homes & Faulkner and *Thos. N. Page*, for the appellees.

LEWIS, P., delivered the opinion of the court.

In November, 1860, soon after the death of the widow of Joseph Hutcheson, deceased, a friendly suit in equity was instituted in the county court of Mecklenburg county, to which the heirs and distributees of the said Joseph Hutcheson were parties, to sell the land and slaves held by the widow in her lifetime as dower, and to distribute the proceeds among those entitled thereto. Sales of the land and slaves were made by commissioners of the court appointed for the purpose, who duly reported their proceedings to the court. Of the eleven parties in interest, six resided in the county of Mecklenburg; the others were non-residents, residing in the States of Tennessee and Arkansas. At the January term, 1863, a decree was entered directing the commissioners to pay to the distributees the sums ascertained to be due them respectively; among them to Mrs. Rebecca A. Brown, afterwards Mrs. Rebecca A. Grubbs, a daughter of Joseph Hutcheson, and a non-resident, the sums of \$557.31 and \$431.57, with interest on each sum from that time until paid. It is admitted that nothing has ever been paid on account of this decree, either to Mrs. Grubbs in her lifetime, or to her personal representative since her death. But it is claimed by the commissioners that the fund, or such part of it as was payable under the decree to the non-resident parties, was afterwards invested in Confederate securities under an order to that effect granted by a circuit judge, pursuant to the act of assembly of March 5, 1863.

To September rules, 1880, of the circuit court of Mecklen-

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burg county, the present suit was brought by Mrs. Grubbs against the said commissioners, in which she claimed a lien on the real estate of the defendants by virtue of the two judgments by decree in her favor rendered by the said county court, at its January term, 1863, as aforesaid. And the prayer of the bill was that the real estate be sold to satisfy the said judgments. The defendants pleaded the statute of limitations, but the plea was overruled, and at the hearing a decree was entered in the plaintiff's favor, from which decree the defendants appealed.

The statute, Code 1873, chapter 182, section 1, provides that "a decree for land or specific personal property, and a decree or order requiring the payment of money, shall have the effect of a judgment for such land, property, or money, and be embraced in the word 'judgment,'" etc. And by section 2 it is provided that "the persons entitled to the benefit of any decree or order requiring the payment of money shall be deemed judgment creditors, although the money be required to be paid into a court, or a bank or other place of deposit. In such case, an execution on the decree or order shall make such recital thereof, and of the parties to it, as may be necessary to designate the case; and if a time be specified in the decree or order within which the payment is to be made, the execution shall not issue until the expiration of that time." It is very clear, therefore, that under the decree of the county court Mrs. Grubbs became a judgment creditor of the defendants; and the question is, whether, inasmuch as no execution has ever been issued on that decree, the right to enforce the lien thereof in a court of equity was barred at the time the present suit was brought. It is undisputed that all proceedings to enforce the judgment at law are barred by the statute. Then, does the lien, which is but an incident of the judgment, remain to be enforced in a court of equity? A brief reference to the law respecting judgment liens on real estate and the means of enforcing them, as it existed prior to the revisal of 1849, is essential to an intelligent determination of this question.

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At common law, except for debts due the king, the lands of the debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. This was in accordance with the policy of the feudal law introduced into England after the Conquest, which did not permit the feudatory to charge, or to be deprived of, his lands for his debts, lest thereby he should be disabled from performing his stipulated military service, and which, moreover, forbid the alienation of a feud without the lord's consent. The goods and chattels of the debtor, therefore, and the annual profits of his lands, as they arose, were the only funds allotted for the payment of his debts. This continued to be the law until the passage of the statute Westm. 2, 13 Edward I, by which, in the interest of trade and commerce, the writ of *elegit* was for the first time provided for. By that statute the judgment creditor was given his election to sue out a writ of *fi. fa.* against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant (except oxen and beasts of the plough), and a *moiety* of his lands until the debt should be levied by a reasonable price or extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the writ was denominated an *elegit*, and the interest which the creditor acquired in the lands by virtue of the judgment and writ was known as an estate by *elegit*. This statute was substantially adopted in Virginia at an early day, and in consequence of this right to subject a *moiety* of the defendant's lands, the courts held that a *lien* was acquired by the judgment, which extended to all the defendant's lands within the State, and which was superior to the claims of subsequent purchasers, though for valuable consideration and without notice. 1 Lom. Dig., marg. page 284 *et seq.*; 2 Minor's Insts. 263, 270; *Borst v. Nalle*, 28 Gratt. 423; *Price v. Thrash*, 30 Id. 515. The lien thus acquired was a *legal lien* (*Leake v. Ferguson*, 2 Gratt. 420), and remained so long as the capacity to sue out an *elegit* continued, whether the

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writ was sued out or not. *United States v. Morrison*, 4 Pet. 124; *Taylor v. Spindle*, 2 Gratt. 44. And, as was said in *Borst v. Nalle*, whenever this capacity finally ceased, "the lien which was dependent upon it was extinguished."

The law also provided the more comprehensive writ of *ca. sa.*, which extended to all the lands of the defendant, and by the levy of which the creditor acquired an inchoate lien, which became consummate upon the defendant's taking the oath of insolvency. If the latter died in execution, the lien was lost. *Stuart v. Hamilton's ex'ors*, 8 Leigh 503.

The time, however, within which executions and writs of *scire facias* could be issued on judgments was prescribed by statute; and in *Flemings ex'or v. Dunlop*, 4 Leigh 338, it was said by Judge Carr that where no execution issued within the prescribed time *the judgment was annihilated*.

The law having thus provided legal remedies for the enforcement of judgments, it was only in cases where those remedies were inadequate, as where the estate sought to be charged was an equitable estate, or where the rents and profits of the lands would not pay the debt within a reasonable time, that equity would take jurisdiction and decree a sale. But in no case does it appear ever to have been even intimated that equity would afford relief where the right to revive or proceed under the judgment at law was lost.

Such was the law at the time of the revision in 1849. And the legislature cannot be presumed to have intended to alter it further than its intention to do so is manifested by the express language employed or by necessary implication therefrom. By that revision the writ of *ca. sa.* was abolished, and the lien of the judgment was expressly given on all the real estate of or to which the defendant is possessed or entitled. The lien of the *fi. fa.* was enlarged, and the operation of the *elegit* (which, however, is now abolished) was extended so as to embrace, not a moiety only, but all the debtor's real estate. And it was further provided that "the lien of a judgment may always be enforced

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in a court of equity." Code 1849, chapter 186, section 9; Code 1873, chapter 182, section 9.

It will thus be seen that the judgment creditor was given the choice, either to proceed at law under the enlarged writ of *elegit* to enforce his judgment out of the whole real estate of the defendant, or to proceed at once in a court of equity, in which by the statute he is entitled to a decree for the sale of the lands, if the rents and profits thereof appear insufficient to pay the judgment in five years. It is undeniable that, prior to the abolition of the writ of *elegit*, in 1872, if the creditor chose to proceed by *elegit*, he must have done so within the time prescribed by the statute. The statute provides that, "on a judgment, execution may be issued within a year; and a *scire facias* or action may be brought within ten years from the date of the judgment; and where execution issues within the year, other executions may be issued or a *scire facias* or action may be brought within ten years from the return day of an execution, on which there is no return by an officer, or within twenty years from the return day of an execution, on which there is such return; except," etc. Code 1849, chapter 186, section 12; Code 1873, chapter 182, section 12. And, by the following section it is provided that, "no execution shall issue, nor any *scire facias* or action be brought, on a judgment in this State, other than for the commonwealth, after the time prescribed by the preceding section, except," etc. *Id.* section 13.

The legislature having thus carefully prescribed the time within which the remedies at law for the enforcement of a judgment may be resorted to, could it have intended to leave the remedy in point of time unlimited in a court of equity? From what has been said, it is plain that to hold that it did, would be a most unreasonable construction, not warranted by the terms of the statute, and opposed to the manifest policy of the legislature. Surely, if such an anomaly as the right to enforce an incident—namely, the lien—of the judgment after the judgment itself is "annihilated" was contemplated, the in-

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tention would have been expressed in terms too plain to be misunderstood. It is true, "the lien of a judgment may always be enforced in a court of equity." But this language, fairly construed, would seem to indicate nothing more than a purpose to confer jurisdiction on courts of equity to enforce the lien, whether the remedies at law are adequate or not. *Price v. Thrush*, 30 Gratt. 515. Moreover, the lien, as we have seen, is a legal lien, and, as "equity follows the law," the construction contended for by the appellee must be rejected. In *Horenden v. Lord Ammesley*, 2 Sch. & Lef. 607, 630, Lord Redesdale, in delivering judgment, said: "I think courts of equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include courts of equity; for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law, and therefore, it must be taken to have virtually enacted in the same cases a limitation for courts of equity also." In *Rowe v. Bentley*, 29 Gratt. 756, Judge Burks in delivering the opinion, said: "The general rule undoubtedly is, that in the application of statutes of limitations equity follows the law, and wherever a demand would be barred at law, an equitable demand of the like character will be barred in equity. 'The bar is applied by analogy, or, according to some authorities, by obedience to the statutory enactment; or, in other words, after a bar has been fixed by statute to the legal remedy, the remedy in a court of equity has, in analogous cases, been confined to the same period,'" citing *Choldmondely v. Clinton*, 2 Jac. & Walk. Ch. R. 1; *Kane v. Bloodgood*, 7 John. Chy. 90; 1 Call. 419, 428. And in *Cole's adm'r v. Ballard*, 78 Va. 139, Judge Fauntleroy, speaking for the court, said: "No principle is better established, or more uniformly acted on in courts of equity, than that in respect to the statute of limitations, equity follows the law,

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that is to say, if a legal demand be asserted in equity, which at law is barred by statute, it is equally barred in a court of equity."

It is needless to multiply words and authorities upon a proposition, which we deem too plain to admit of doubt. Our conclusion, therefore, is that the lien of a judgment is a legal lien, conferred by the express terms of the statute, though enforceable in equity, and ceases with the life of the judgment upon which it is founded. The subject was ably and elaborately considered by the Supreme Court of Appeals of West Virginia, in the recent case of *Werdenbaugh v. Reid*, 20 W. Va. 588, and the same conclusion reached.

It only remains to say, that while the general rule in equity is not to apply the bar of statutes of limitation in suits to enforce equitable demands against trustees and other fiduciaries, (1 Pom. Eq. section 419; 1 Story's Eq. section 529), this rule has no application where the demands are merged in a judgment, which as such is sought to be enforced, as in the present case. This proposition, however, requires no discussion, as we understand it to be conceded by the counsel for appellee.

DECREE REVERSED.

Richmond.

HUGHES v. TINSLEY & BROTHER.

FEBRUARY 19th, 1885.

1. EVIDENCE—*Extrinsic*.—Where a written contract is perfect in itself and its terms are clear and intelligible, parol testimony is inadmissible to contradict, vary, or materially to affect it by way of explanation.
2. PRACTICE IN CHANCERY—*Answer*.—Where bill sets forth a contract and the plaintiff's construction thereof, and the answer admits the contract and claims under it, but denies the correctness of the plaintiff's construction, this is not such a denial as *per se*, entitles the respondent to a dissolution of the pending injunction.
3. CONTRACTS—*Construction—Case at bar*.—H. by written contract, sells T. & Bro. certain growing timber, and allows them four years to cut it down. Afterwards, she endorses on the contract these words: "I agree to extend the time for cutting timber as fixed in this contract each year T. & Bro. rent and operate the G. steam mills, said extension to cover a period of five years from the expiration of this within contract, this extension of time being based on said T. & Bro. renting and operating said G. steam mills." Before the expiration of the four years, said mills burned down and were never rebuilt, and had never since then been rented and operated by T. & Bro.

HELD:

1. The extension was to begin after the expiration of the four years, and the condition upon which the extension was to begin, never was fulfilled.

Appeal of Mrs. Anne F. Hughes, by her husband, George Hughes, from decree of circuit court of Gloucester county, entered March 2nd, 1883, in a cause wherein she is complainant, and R. C. Tinsley & Brother are defendants.

Opinion states the facts.

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J. B. Donoran, John S. Wise and H. R. Pollard, for the appellants.

J. N. Stubbs and Margus Jones, for the appellees.

LACY J., delivered the opinion of the court.

On the 12th of March, 1883, the appellant applied to the judge of the circuit court of Gloucester, in vacation for an injunction to restrain the appellees from cutting wood and timber from her land in the county of Gloucester.

In her bill by her next friend, the complainant, a married woman, and J. F. Ross her trustee, set forth that on the 10th day of February, 1879, the appellant entered into a written contract with one R. C. Tinsley, whereby she sold to said Tinsley "all the timber on the tract of land known as the 'Court-house tract,' (except the chestnut timber), ten inches in diameter and over," to be paid for as therein specified, "the said R. C. Tinsley to have four years time in which to cut said timber from the date of the contract, and filed the contract with the bill. And, further, that on the 9th day of June, 1880, she extended to the firm of R. C. Tinsley & Brother, of whom the said R. C. Tinsley was a member, the time for cutting timber as fixed in the said contract, each year that R. C. Tinsley & Brother rents and operates the Gloucester Steam Mills, said extension to cover a period of five years from expiration of the contract for four years, this extension of time being based on R. C. Tinsley & Brother renting and operating said Gloucester Steam Mills, which extension was endorsed on the back of the first contract for cutting the wood, which by its terms was to continue for four years as stated above, and is as follows:

"I agree to extend the time for cutting timber as fixed in "this contract, each year R. C. Tinsley & Brother, rents and

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“operates the ‘Gloucester Steam Mills,’ said extension to cover
“a period of five years from expiration of this within contract,
“this extension of time being based on the said R. C. Tinsley
“& Brother, renting and operating said ‘Gloucester Steam
“Mills.’

“Gloucester Courthouse,
“June 9th, 1880.

ANNIE F. HUGHES,
per Geo. Hughes, *Attorney.*”

That in 1881, before the expiration of the four years, the Gloucester Steam Mills had been consumed by fire, had never been rebuilt and had never been since that time rented and operated by Tinsley & Brother. That the four years had expired on the 10th day of February, 1883; that Tinsley & Brother had not rented nor operated the said Gloucester Steam Mills, since the expiration of the said four years, and that their right to cut timber on her land had ceased. That, nevertheless, in disregard of the rights of the complainant, the said Tinsley & Brother were proceeding to cut timber from the land, and were committing waste thereon; that should they continue to do so great and irreparable mischief would be done, which could not be compensated in damages, &c., and praying an injunction, &c. On the day following, an injunction was awarded in accordance with the prayer of the bill.

On the 20th of the same month, the defendants filed their answer.

They admitted the contract as set forth in the bill for cutting the wood, and the extension as stated herein upon certain conditions setting forth in full, the said agreement for the extension; admitted that they were cutting the timber after the expiration of the four years, in the original agreement fixed and limited, and admitted that the said Gloucester Steam Mills had been burned on the 18th of June, 1881, and had not since been operated and had never been rebuilt. Claimed the right to cut timber beyond the expiration of the four years, originally agreed on because they had rented and operated the Gloucester Steam Mills

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one year and seven months, before they were burned, and that by the terms of the agreed extension, they were entitled to add this year and seven months, to the four years after their expiration, because it had been agreed by the terms of the said extension, that the time should be extended for cutting timber as fixed in the original contract, each year R. C. Tinsley & Brother, rents and operates the Gloucester Steam Mills. That by operating the Gloucester Steam Mills, they had been prevented from cutting timber, and had delayed doing so, "did not care to do so," as the complainant had promised that the time in the original contract should be extended, that they had paid the agreed price for the wood which was a sum certain, and had lost a year in their operations in cutting the timber, by reason of their renting and operating the said Gloucester Steam Mills.

The testimony of one witness was taken to show the understanding of the parties as to the extension agreed on, to be an extension of the wood cutting contract, after its expiration for each year the defendants operated the Gloucester Steam Mills, not to exceed five years.

The cause was brought on in vacation, on the 2nd day of March following, on the bill, answer with replication thereto, the exhibit, the examination of a witness (an affidavit which was excluded), and the motion of the defendants to dissolve the injunction heretofore awarded in the cause.

When the circuit court "being of opinion that the answer is responsive to the bill, and denying all the material allegations thereof, and that the evidence offered by the plaintiff is insufficient to overturn such denial of the answer," dissolved the injunction by decree that day entered in the cause. Whereupon, the appellant applied for and obtained an appeal to this court on the 31st of the same month.

The main question involved in this case here is the true construction of the agreement of June 9th, 1880, by which the wood cutting contract of February, 1879, is claimed to be enlarged as to the time allowed for cutting the wood. And this

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construction, so far as it is plain and unequivocal, must be upon the terms of that agreement itself. For generally, oral testimony is not to be received to contradict, vary, or to materially affect, by way of explanation, any written contract, whether within the statute of frauds or not: provided, the contract is perfect in itself, and is capable of a clear and intelligible exposition from the terms of which it is composed. The exceptions to this general rule are not necessary to be stated here. See *Stackpole v. Arnsed*, 11 Mass. p. 27; *Preston v. Lucean*, 2 W. Black, 1249; and *Cokes v. Guy*, 2 Bosanquet & Puller, 565.

The extension provided in this case is, "to extend the time for cutting timber fixed in this contract, each year R. C. Tinsley & Brother, rents and operates the Gloucester Steam Mills, said extension to cover a period of five years from expiration of this within contract, this extension of time being based on the said R. C. Tinsley & Brother, renting and operating the said Gloucester Steam Mills."

The extension provided for here, is plainly an extension after the expiration of the four years originally agreed on, for each year Tinsley & Brother should rent and operate the Gloucester Steam Mills, not to exceed five years. The Gloucester Steam Mills were not rented and operated any year, nor at all after the expiration of the four years. The condition, therefore, upon which the four years were to be extended, was never fulfilled, and no extension was effected at all under the agreement of the parties, and the right to cut timber under the contract ceased at the expiration of the four years. On the 10th day of February, 1883, the circuit court dissolved the injunction awarded in this case, upon the ground that the answer of the defendants was responsive to and denied all the material allegations of the bill, and that the evidence of the plaintiff, was insufficient to overturn such denial of the answer.

This was plainly erroneous, the answer not only did not deny all the material allegations of the bill, (except in general terms to that effect), but distinctly admitted the most material allega-

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tions thereof, denying only the construction put upon the contract by the plaintiff, and admitted the contracts, setting them forth in full, and claiming under them; and under the plain terms of these agreements the right of the defendants to cut wood on the land of the plaintiff in the bill mentioned has ceased. It was, therefore, erroneous in the circuit court to dissolve the injunction upon the case made in this record.

There was no evidence taken by the defendants, to establish the affirmative matter, of hardship and the like set up in their answer, and as to the proper disposition of the felled timber on the land, and upon these matters we will express no opinion.

But the decree of the circuit court dissolving the injunction, will be reversed, and the cause remanded to the said circuit court of Gloucester county, with directions to reinstate the said injunction, and for further proceedings to be had therein, to fully adjust the rights of the parties, as may then more fully appear, and to proceed to a final decree in the cause in accordance with the foregoing views.

DECREE REVERSED.

Richmond.

FRAZIER v. HENDREN.

MARCH 12th, 1885.

Absent, *Hinton*, J.

1. JUDICIAL SALES—*Purchaser*.—Re-sale having been directed of certain Springs property for default of payment of the purchase money wherefor M. as surety for F. was bound, M. contracted with parties having interests in said property to buy it, and form a joint-stock company to manage it. To this company as the purchaser the sale was made, reported and confirmed, and the property conveyed; and the contract being before the court with the report of sale, M. was treated as the agent of the company.

HELD:

M. was not personally liable as purchaser.

2. VENDOR'S LIEN—*How extinguished*.—Such lien may be extinguished by payment of the purchase money, or it may be waived or surrendered by the voluntary act of the vendor. Case at bar is an instance of such extinguishment of lien.
3. JUDICIAL SALES—*Case at bar*.—Part owners and lienors of the Springs property agreed, as a joint-stock company, to buy it, and to pay off the claims on it in the stock and bonds of the company. They so bought it, and the agreement was returned to the court with the report of the sale,—certain other creditors, not parties to the agreement, assenting to it.

HELD:

The purchaser's liability was to pay *money*, and it cannot be discharged in any other thing, *quoad* any party in interest, against his wishes.

4. SETOFFS—*Case at bar*.—In *Frazier v. Frazier*, 77 Va. 775 (to which case at bar is sequel), a certain sum was held due J. A. F., and to be a lien on the property of the R. A. Springs company, and that property was

Syllabus—Statement.

directed to be sold in default of payment. When the case went back the company brought in as setoffs to that sum, certain judgments against J. A. F. Upon appeal by him :

HELD :

1. These judgments were lawful setoffs against the decree.
2. The decree in *Frazier v. Frazier* is without error and will not be disturbed, except so far as the costs were given against the appellees generally, when they should be against only W. F. who alone of the appellees had contested the rights of the appellant.

Appeal of James A. Frazier from two decrees of circuit court of Augusta county, entered July 3rd, 1884, and November 22d, 1884, respectively, in the cause of *Frazier v. Frazier* (77 Va. 775), after it had been sent by this court back to the circuit court by the decree of October 11th, 1883, and the several petitions of Mason and others for the rehearing of the decree last aforesaid. Opinion states the case.

F. S. Blair and *Jos. Christian*, for James A. Frazier.

Shelley & Bumgardner and *G. M. Cochran*, for Orson Adams, receiver, John T. Randolph, and the R. A. Springs company.

T. C. Elder, for C. R. Mason.

W. A. Anderson, for Campbell's adm'r.

LEWIS, P., delivered the opinion of the court.

This case is before us on the petitions, respectively, of C. R. Mason, James Campbell's administrator, Orson Adams, receiver, and others, for a rehearing of the decree of this court, entered on the 11th of October, 1883, on the former appeal in this case, under the style of *Frazier v. Frazier et als.*, and also on appeal allowed James A. Frazier from two decrees of the circuit court of Augusta county, rendered after the case was removed to that court.

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The main facts connected with the history of this protracted litigation, are set forth in the opinion of the court on the former appeal, reported in 77 Va. 775, and need not be again adverted to, further than is necessary for a correct understanding of the questions now before the court.

On the former appeal certain questions, affecting the rights of parties other than the principal parties to that appeal, were not brought to the attention of the court in the arguments of counsel, and certain parts of the record pertaining to those questions were then wanting, which are now supplied. Those questions are important, and have been ably discussed by counsel, and carefully considered by the court.

We will first dispose of the question as to the liability of C. R. Mason, as purchaser of the Rockbridge Alum Springs property, at the sale thereof in June, 1880. It appears, that at a former sale of the property, under a decree of the court, in September, 1868, James A. Frazier became the purchaser, at the price of \$236,000, with M. G. Harman as his surety. Afterwards Harman withdrew as surety, when Mason, for the accommodation of Frazier, became his surety in Harman's place. Frazier, however, being unable to make the deferred payments as they fell due, a decree directing a re-sale was entered at the November term, 1879. And Mason having thus become bound as surety, and being anxious to protect himself, if possible, against loss on that account, entered into agreements, prior to the day of sale, with certain persons who were part owners of the property, or the holders of liens thereon, to unite with him in the formation of a joint-stock company for its purchase, he agreeing to take stock in the company to the amount of \$7,500, to be paid for in cash. These agreements were reduced to writing, and were afterwards filed as exhibits with the report of sale.

It appears from these exhibits: 1. That Mason agreed to buy the property at the then advertised sale, provided it could be bought at a price not exceeding \$135,000; 2. That Mason was

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thereafter to obtain a charter of incorporation for the proposed company, to be known as the Rockbridge Alum Springs Company; 3. That certain of the parties agreed to accept, and that Mason agreed to cause to be issued to them paid up shares of stock in full discharge of their claims on the property; and 4. That to secure the payment of other claims, payable out of the proceeds of sale, a deed of trust should be executed on the property by the company when organized, and that bonds secured thereby should be issued in two classes, the first to discharge the vendor's lien in favor of James Campbell's administrator, and the second to be used in paying off other claims against the property, or the fund to be realized from its sale. The administrator and distributees of Campbell's estate acceded to this arrangement, as did other creditors who were not formal parties thereto.

At the sale, the property was knocked off to Mason, as the highest bidder, at the price of \$134,000, and soon thereafter the agreements aforesaid were fully carried out on his part. The company was duly chartered and organized, and stock and bonds issued as stipulated. The terms of the agreements between the parties were made known to the commissioners of sale, who accordingly dealt with Mason as a mere agent or trustee, and so reported to the court, filing with their report the agreements as exhibits. "From these exhibits," they said, "it will be seen that C. R. Mason really purchased the property as trustee for the parties to whom over one-half of the \$131,298.32 due upon the property, as of June 16th, 1880, is payable, and that parties entitled to over \$47,000 of the residue of the fund have agreed to accept the mortgage bonds to be issued as provided for in the contract * * * in discharge of their respective claims against the property and the fund as they stood on the day of sale." And in its decree of July 3rd, 1880, confirming the sale, and in the subsequent decree of November 30th, 1880, Mason was treated by the court as a trustee for the parties, and the Rockbridge Alum Springs

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Company as the real purchaser, to which the property was afterwards conveyed, by a special commissioner under the direction of the court.

It will thus be seen that Mason has fully performed the agreement on his part, and has acted and been dealt with throughout as an agent merely. It is plain, therefore, that he can be regarded in no other light than as a nominal purchaser, liable in no aspect of the case to any of the parties to this suit, and that the circuit court properly so held. Indeed, the question was in effect decided by this court on the former appeal, in decreeing, as it did, directly against the company in favor of the appellant, for the sum ascertained to be due him.

The next question relates to the *status* of the Campbell lien. It appears that in 1851, James Campbell sold the Rockbridge Alum Springs property to Booth, Anderson and Christian, and retained the legal title as security for the payment of the purchase money. In the following year, the property was sold by Booth, Anderson and Christian to John W. Frazier, who afterwards sold a fourth interest therein to John T. Randolph and William Frazier, respectively. In 1860, after the death of James Campbell, his heirs at law by deed, deposited as an *escrow*, conveyed the legal title to James A. Frazier, the appellant here, as the sole heir at law of John W. Frazier, who in the meantime had died, the deed to be delivered upon the payment in full of the balance of purchase money due to Campbell's estate. After the purchase of the property by Mason, for the Rockbridge Alum Springs Company, and the confirmation of that sale, the mortgage bonds of the company to the amount of the unsatisfied vendor's lien, were accepted and receipted for by the administrator of Campbell, in full satisfaction of the lien, and thereupon the deed of the Campbell heirs to James A. Frazier, was by the decree of November 30th, 1880, ordered to be delivered to the company as the purchaser of the property.

By the decree of this court, of the 11th of October, 1883, it

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was adjudged that out of the proceeds of the sale James A. Frazier was entitled to be paid the sum of \$57,629.41 as of October 1st, 1880. This sum was declared to be a *lien* on the property, and accordingly the deed of the special commissioner to the company was set aside and annulled; and it was further decreed and ordered, that unless the company should pay to Frazier, within a specified time, the sum thus ascertained to be due him, the property should be re-sold to pay the same.

In this state of things, it is now insisted by Campbell's administrator that inasmuch as the bonds of the company were accepted by him in discharge of the vendor's lien, in the belief that the deed of trust to secure their payment constituted the first lien on the property, paramount to the claims of all other persons—which expectation has been disappointed—the vendor's lien ought to be restored, or at least that Frazier's lien ought to be postponed to that in favor of the Campbell estate.

It is undoubtedly true that a court of equity will never compel a vendor to part with the legal title until the purchase-money has been paid, or the lien therefor has been waived or extinguished. It has been said to be a natural equity, that when land is sold it should stand charged with the unpaid purchase-money, and that a court of equity considers a debt as never discharged until it is paid to the proper person and by the proper person. 2 Min. Insts., 190; *Watts v. Kinney*, 3 Leigh, 272; *Knisely v. Williams*, 3 Gratt., 253; *Yancey v. Mauck*, 15 Id., 300; *Coles v. Withers*, 33 Id., 186.

But, as was justly observed by the learned judge who heard this case in the circuit court, persons holding liens may surrender and lose them by their own voluntary act; and that the vendor's lien in the present case has been waived and extinguished there can be no doubt. This is shown by the agreement of the administrator to accept the mortgage bonds of the company in satisfaction of the lien, his subsequent acceptance of the bonds, and his receipt in full, and by the decree, entered

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without objection, directing the deed of the Campbell heirs to be delivered to the purchaser.

It is contended, however, that the relation of the parties having been disturbed by the decree of this court, the vendor's lien ought to be kept alive to prevent injustice to those whose claims prior to that decree were superior to those of James A. Frazier.

This argument in a court of equity would be irresistible if the course and conduct of the parties in changing their original position had been in any way influenced by him. But in truth it was not. On the contrary he said nothing and did nothing by which directly or indirectly the parties were induced to act, or by which he ought to be held estopped from controverting their claim to a lien paramount to his own. It is true he was originally a debtor of the Campbell estate for the unpaid purchase-money, and that after the sale in September, 1868, when he became the purchaser of the property, he became the debtor of all the parties interested in the property or in the proceeds of sale. But this relation was changed when, at the last sale, in June, 1880, the Rockbridge Alum Springs Company became the purchaser, for a sum equal to that due by him on account of the first sale. Then it was, as determined by the decree of this court, that the company became the debtor, and he a creditor of the fund to an amount exceeding \$57,000. It is also true that when the vendor's lien was released, he was supposed to be entitled to no interest in the property, nor to any part of the proceeds of sale. But it is equally true that the parties acted with knowledge of his legal right to appeal from the decrees of the circuit court, and therefore took upon themselves the risk of an appeal and its consequences. And having thus acted freely and voluntarily, with their eyes open, and without fraud or imposition or influence of any kind on the part of James A. Frazier, they are not now entitled as against him to be released from their own voluntary contracts, because,

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in the light of subsequent events, those contracts were incautiously and injudiciously entered into.

The same considerations apply with equal force to the position of Orson Adams, receiver, a judgment creditor of John T. Randolph, and with greater force to that of Randolph himself. The former agreed to accept the bonds of the Rockbridge Alum Springs Company, in satisfaction of his claims, which were duly delivered to him, whereupon he executed a receipt in full, and assigned his claims, without recourse, to the company. The latter became one of the incorporators in the company, pursuant to his agreement to receive its stock in satisfaction of his claims, which were accordingly transferred by him to the company.

It is true, that in the opinion of this court, on the former appeal, it was said that the charge on the property in favor of the appellant would be second in dignity to the Campbell lien only, and of equal dignity with the Randolph debt. But no such provision is contained in the decree. The truth is, the controversy was virtually between the appellant, on the one hand, and the appellee, William Frazier, on the other; and the question was not discussed, nor even alluded to, in the arguments of counsel. Moreover, the record, as it then was, while it pointed to the agreements between the parties to surrender their liens for the bonds and stock of the Rockbridge Alum Springs Company, did not contain, as it now does, the report of the commissioners of sale, and the accompanying exhibits, showing those agreements in detail, and the acts and receipts of the parties in pursuance thereof. It is not strange, therefore, that the question as to the relative priorities of the liens, should not have received the mature consideration of the court. Now, however, the facts very fully appear in the record, and in the light of all the facts, as they now appear, we are constrained to conclude that the lien of the appellant is paramount to all others; and that it is so: 1. Because, as we have seen, the vendor's lien has been relinquished by the voluntary act of the parties themselves; and 2. Because,

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as was held by the circuit court, "the liens of Randolph and others, in like case, with him are gone, lost and merged in their new attitude of share-holders in the Rockbridge Alum Springs Company," which is now the debtor no less of James A. Frazier than of Campbell's administrator. The latter proposition would seem to be self-evident.

The next question was raised by the company. It contends that its contract was to pay, not in money, but in the claims of various parties on the property, and that it cannot therefore be compelled to pay in money any part of the price for which it became the purchaser. But this position is not well taken. The decree of resale directed the property to be sold for *money*, on the terms of ten per cent. of the purchase money to be paid in cash, the residue in equal installments at one, two, three, four and five years, respectively, from the day of sale, and the purchaser to execute bonds for the deferred payments, with good personal security. These terms were duly advertised, and at the sale, with the exception of a small tract of mountain land of comparatively little value, the property, which in 1868 was knocked off to James A. Frazier for \$236,000, was sold to Mason, as agent, for \$134,000. To the arrangement between the company and those having claims against the property, the court, though informed of it, was in no sense a party. And hence it is clear that the obligation of the company was to pay in money, and could not, therefore, be discharged, without the sanction of the court, otherwise than by a payment in money, as against any creditor of the fund without his consent.

In this connection, the case of *Harman v. Jordan*, is referred to by counsel. That case was decided by this court in 1872, but was never reported, nor is the opinion to be found among the records of the court. The facts in this case were substantially these: Harman was decreed to be entitled to a debt amounting to \$10,000, which constituted the first lien on certain property of which he afterwards became the purchaser

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under a decree of the same court. After the sale it was determined that he was entitled to one-third only of the debt in question. Thereupon, claiming to have been induced by the first decree to buy the property, and to bid therefor a higher price than it would otherwise have brought, he insisted that he ought to be released from his bargain. But the circuit court held otherwise, and on appeal the decree was reversed; this court holding that the appellant, the purchaser, ought to have the option of having the sale to him confirmed or set aside, and a new sale ordered, which option was accordingly tendered him.

It is obvious that the principle on which that case was decided has but little application to the case in hand. Here nothing was adjudicated in favor of the Rockbridge Alum Springs Company, except to confirm to it the sale that had been made. The price at which it obtained the property was reported to be a fair one, though greatly less than the sum bid for it at the previous sale. And if, in the discharge of its obligations, the claims of certain persons supposed to be good were used as cash, such claims were assigned and accepted, subject to the rights of the appellant, who, being no party to the arrangement, could not be bound thereby.

The next question arises on the present appeal from the decree of July 3, 1884, in respect to the Hendren judgment. It appears that these judgments were recovered against James A. Frazier and William Frazier on certain negotiable notes, drawn by the former, and endorsed as surety by the latter. They were paid off by Hendren, trustee, in a certain trust deed for the benefit of William Frazier's creditors, and now inure to the benefit of the Rockbridge Alum Springs Company. They were not embraced in the accounts between the parties, and consequently were not and could not have been passed on by this court on the former appeal. The main controversy then related to the transactions of William Frazier in respect to the purchase and management of the springs property, and as

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guardian and administrator. The decree of this court ascertained the balance due the appellant on account of those transactions, and directed a resale of the property in default of its payment.

After the case went back to the circuit court, the judgments in question were brought in by petition as evidence of payment *pro tanto* of the sum decreed against the company, and were allowed as such. So far as the record discloses, no objection was raised by the appellant as to their validity or binding force and effect, but the objection to their allowance as a credit seems to have been based on the sole ground that the circuit court was charged with the mere ministerial duty of entering the decree of this court, and nothing more. Under these circumstances, therefore, the validity of the judgments and their assignment not being disputed, they were properly allowed in favor of the company. The property of the company was ordered to be sold only in the event it should fail to pay off the lien of the appellant within a specified time; and it appearing to the court that to the extent of the undisputed judgments that lien had been discharged, it was proper that the company should be credited accordingly. And in so decreeing, the circuit court did not depart from the terms of the mandate of this court, but proceeded in accordance therewith.

It is true the decree of this court settled the rights of the parties as to the sum due the appellant, and left nothing on that subject to be adjudicated by the circuit court. But it cannot be contended that if, after the entry of that decree, the company had fully paid the appellant's lien in lawful money, it would not have been entitled to show that fact to the circuit court as evidence that the decree had been satisfied. And if not, why should it not be entitled to the benefit of undisputed offsets as equivalent to payment in part? There is no distinction in principle between the two cases, and the decree of the circuit court is therefore plainly right.

The appellant, however, now contends that at the time the

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judgments were recovered, and afterwards when they were paid off by Hendren, trustee, William Frazier was indebted to him in a sum in excess of the aggregate amount of the judgments, apart from the sum decreed in his favor against William Frazier by this court, and that the fact is apparent from the record as it was on the former appeal. On the other hand, it is contended that by reason of a clerical error in the accounts as they appear in the record, amounting to the principal sum of \$1,000, and other credits to which those representing by assignment the interest of William Frazier are entitled, the balance so decreed is in excess of the correct amount due the appellant.

In the opinion of the court on the former appeal, it was said, that a sum exceeding \$57,629.41 was due the appellant, but for reasons then stated the sum decreed in his favor was limited to that sum. We are of opinion that by that decree substantial justice has been done the parties, and that there is no reason for altering it, except in respect to the payment of costs. The controversy, as before said, was between the appellant, on the one hand, and William Frazier, and those claiming under him, on the other. The decree, however, imposed costs on the appellees generally, thus doing injustice to those of the appellees who were not contesting the claims of the appellant. It will, therefore, be amended in this particular, and the costs will be decreed against William Frazier and Hendren, trustee.

Objection is also made to the last of the decrees appealed from in respect to the appointment of commissioners of sale. The appellant complains that a majority of the commissioners are counsel in the cause, representing interests hostile to his own. But this objection is not well founded, in view of the number of parties having separate and distinct interests, and the further fact that of the five commissioners two are the counsel of the appellant.

We are, therefore, of opinion to amend the decree of this court in the particular indicated, and to affirm the decrees of the circuit court.

Dissenting Opinion.

FAUNTLEROY, J., and RICHARDSON, J., concurred.

LACY, J., dissenting, said:

I dissent from the opinion of the majority. The effect of the majority opinion is to destroy the vendor's lien of the Campbells. James Campbell sold the property in question to Booth, Anderson and Christian, and retained the title. Frazier's father, John W. Frazier, bought this property of the said Booth, Anderson and Christian, and the title was still reserved in the Campbells. The purchase money has never been fully paid to the said Campbells, and one of their vendees cannot claim any title to this property superior to theirs until he has paid the purchase money. When John W. Frazier bought of the vendees of the Campbells, he sold one-fourth of the same to Wm. Frazier, his brother, and one-fourth to Jno. T. Randolph, who is his kinsman, retaining one-half himself. His one-half descended to his son, James A. Frazier, who was an infant of tender years at the time of his father's death. William Frazier assumed the position of guardian for James, and administrator of John W., deceased, and assumed control of the Rockbridge Alum Springs as surviving and managing partner, and held the two last named positions for many years—having soon been removed as guardian.

The opinion rendered at the first hearing of this case, reported in 77 Va. Rep. 775, sets forth how James F. suffered at the hands of this managing partner, and administrator of his father, and upon a correction of errors a sum due to William Frazier was subjected to compensate James A., and a sale of the property ordered to pay it; and the lien which William Frazier or his assignees had, retained for the benefit of James A. Frazier. But there was no controversy between James A. Frazier and the Campbells; their lien as the original vendors was respected, so far as it remained unpaid, and held to be the

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first lien on the property, and the liens of Randolph and James A. Frazier were recognized as standing upon an equal footing. And this was inevitable, because, in all the assignment of errors here, and in all the long litigation between the two Fraziers, there had never been any hint of any denial of the right of the Campbells to have payment of their money, for which their property had been sold, before the purchaser could demand the title to it; and there was no hint of any dispute with Randolph; he had never been administrator of John W. Frazier, nor managing partner; he was simply one-fourth owner, as William Frazier was, and James A. Frazier, claiming under his father, was one-half owner.

But we have now arrived at a point when we are told that the Campbells have lost their lien, and Randolph his. How? If John W. Frazier were alive, under whom alone James A. has any rights, Campbell would hold the prior lien, *against* which John W. Frazier could offset nothing, because he had no rights except and *under* it, as Campbell's vendee, and when the Campbell's lien was paid, Frazier would have what Campbell formerly had, by reason of his purchase of the same.

But we are told the Campbell debt is not extinguished, but the lien is gone, and James A. Frazier, his vendee, has come to hold a lien superior to his vendor's lien; that is, something superior to the source of his title. He, or his father, bought what the Campbells had, at an agreed price; the price has never been paid, but he has what he bought, without paying the purchase price, and the Campbells have not the price at which they sold their property, but something else, which is inferior to what Frazier has fallen heir to, by a sort of law *legerdemain*. How did Frazier manage to get his position, and that of the Campbells, his vendors, thus shifted? Once their positions were undisputed, and Campbell was the owner of the property, and Frazier had no concern with it.

But the Campbells sold their property, and retained the title until the purchase money had been paid in full; the purchase

Dissenting Opinion.

money has never been paid in full; and the Campbells have never released their lien to Frazier. The opinion of the majority points out how this transformation has been effected.

Let us look at it! The springs were sold for division and distribution. James A. Frazier became the purchaser and paid his one-half interest credited to him. He was unable to pay for the property, and it was resold and bought by C. R. Mason, who sold to the Rockbridge Alum Springs Company. The circuit court confirmed the sale, and the Campbells took for their first lien, from this company, first mortgage bonds on the property. The other parties in interest took shares of stock for their respective interests, and the sale being confirmed, and the proceeds thus distributed, the cause was removed from the docket. James A. Frazier appealed, and this court, proceeding to correct errors assigned and complained of against him in the settlements between his, and his uncle William's interest, decided in effect that the share which his father's administrator had in the sales to the Rockbridge Alum Springs Company belonged to James A. Frazier, because of errors in the settlements between them; and limited the amount of his recovery to the precise and exact amount due William Frazier from the Rockbridge Alum Springs Company, and decreed that it should be a lien on the property second only to the Campbell lien, and of equal dignity with the Randolph lien; that is, that it occupied precisely the same relative position as to Campbell and Randolph which William Frazier's interest did, and which John W. Frazier's interest did. The litigation was between James and William Frazier, and whatever restitution was to be made to James Frazier was to be taken out of the interest of the person at whose hands he had suffered injury. I thought then and I think now this was just. But it has been strenuously argued here by the counsel for James Frazier that such is the depreciation of the property in question, that at a sale now it will sell for but little more than enough to pay the vendor's lien of the

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Campbells. This ought not to be considered in the determination of this case.

It must be remembered that the Rockbridge Alum Springs Company did not contract to pay William Frazier money for his interest, nor did it agree to pay money to the Campbells. The agreement was that the *creditors* of *James A. Frazier*, other than the Campbells, should associate themselves together and buy the property, the Campbells to receive first mortgage bonds of the company, delivering their deed to the said company; and it is thus claimed that they relinquished their lien to the company. But they have not released it to William nor to James Frazier. It is the first lien now on the property in the hands of the company, and where the shares of stock of William Frazier are cancelled by order of this court, and money in equal amount decreed to be paid to James Frazier by the company, which is something the company never agreed to pay William Frazier or any body else, and held to be a lien on the property; how will the court manage to hold up the Campbell lien long enough to put the Frazier lien under it?

Is there any equitable principle upon which this can be done, other than some equity which will affect the Campbells as between themselves and the Fraziers? I think not! How can Frazier claim to hold the property of the Campbells without paying for it, by asserting that somebody else bought it and did not pay for it?

All this is an unfounded contention. The Campbells delivered their deed to this purchaser at this judicial sale *upon condition*, that their first lien was preserved, and the sale confirmed to the purchaser as made. This court sitting upon the cause precisely as the circuit court did, and proceeding to enter such decree as the circuit court ought to have entered, cannot say that it will defeat the condition upon which the Campbell deed was delivered; and while the court puts it out of the power of the purchaser to comply on its part with the condition, by setting up another first lien never contemplated between the

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parties, and yet hold on to the deed of the company, not for the benefit of the purchaser to whom it was thus delivered, because if for its benefit, it is still the first lien on the property, but for the benefit of a party to whom the Campbells never owed a dollar in this whole controversy, but whose creditors they are, now as ever; for it is not pretended that either Frazier has paid them the purchase money due them.

It is erroneous to speak of the lien of the Campbells being lost, gone and extinguished. It has never been so extinguished by any act of theirs, and certainly never in favor of Frazier, for whose benefit it is now used.

What has been said applies by similar reasoning to the Randolph interest. If Frazier has acquired a lien superior to Randolph's, how did he get it? Not by any act of these parties. They once held shares of equal dignity, and were co-partners. The sale at which this purchaser bought was a sale to pay the amounts due by James Frazier, as purchaser, to Randolph, and thus his obligation to pay William Frazier has been extinguished by a counter claim. But how did he extinguish his obligation to pay Randolph his share? He has never done so at all. It has never been pretended in this suit that Randolph owed him anything; and how does he get released, in the first place, from the obligation to pay Randolph his share of the property by showing offsets against William Frazier? In the second place, how does he get a prior lien on this property, as to Randolph, by any recasting of accounts between him and somebody else?

When the Rockbridge Alum Springs Company purchased this property, it was *in effect* a purchase by the creditors, who agreed to hold shares of joint-stock in the like proportions and relations as their debts stood. The Campbells agreed to deliver their deed to the property, upon *the condition* that their first lien was preserved to them in the form of first mortgage bonds of the company. If this arrangement was erroneously sanctioned by the circuit court, and this court feels called upon to

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set aside the arrangement, as made, should not the parties be restored to the *status quo*? Can it be set aside upon any other terms?

Did the circuit court have any power or authority at that time to compel the parties to make any other contract than such as they agreed to make? And if not, can this court now do it, and say it is proceeding to enter such decree as the circuit court ought to have rendered? If at that time the circuit court had substituted James Frazier to the rights and interests of William Frazier, as this court has since done, and James Frazier had declined, as he now declines, to receive shares of stock for his share of the fund, the circuit court could not have compelled him to do so, and this court cannot now compel him to do so against his consent.

But if he had refused to unite with the others, the transaction would have failed altogether, and the circuit court could not, as this court cannot now, compel the others to go into the arrangement against their consent, then the sale could not have been made by the circuit court, as it was made, and this court cannot now say that the circuit court should have so decreed, and cannot so decree, saying this court is now proceeding to enter such decree as the circuit court should have entered, because the circuit court could not have entered any such decree by any possible view of the case.

What, then, if the circuit court had done what this court has since declared it should have done, and put James Frazier into the place of William Frazier, at that time would have been a proper decree for the circuit court to have entered? Answer that question, and you have the answer to the question: what decree should this court now enter here?

James Frazier, thus enlarged by the recovery from William Frazier, would have stood before the court as the purchaser of the Springs, owing \$132,000, less \$57,629.41, that is, \$74,370.59, and the owner of the Springs when that was paid. If he could have sold the Springs for \$132,000, he would have been enti-

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tled to keep the \$57,629.41, and been obliged to pay to Campbell, Randolph and others, \$74,370.59. If neither this, nor any other purchaser had appeared, the court ought to have made the sale, to satisfy the debt of \$74,370.59 still unpaid of the purchase money due by James Frazier, out of which the Campbells would have been *first* paid. If, however, this agreement had then been entered into by the parties, it should have been enforced by the court, but enforced *as made*. The circuit court had, and this court has, the power to enforce no contract except such as the parties thereto entered into and agreed to.

That court had, and this court has, no power to make a contract for these parties. This cannot be denied. It may then be asked, did these parties, first or last, at any time whatever, make the contract set up for them in the decision of the majority? If so, when and how did the Rockbridge Alum Springs Company ever agree to pay James Frazier or William Frazier, or any other person, \$57,629.41 in money? Never, anywhere, at any time. When did the Campbells ever agree with any person to release their first lien on this property; if so, to whom and when? They contracted for the lien of first mortgage bonds; the other parties all agreed to preserve their lien thus. But this court now says that the circuit court ought to have entered a decree to put their vendee in their lien and stead as to their own property, without the payment on his part of the purchase money.

In writing and delivering the opinion of this court at the first hearing, concurred in by all the judges, I used plain words to show my meaning on this point, declaring that the lien of James A. Frazier "was second only to the Campbell lien, and of equal dignity with the lien of Jno. T. Randolph." That is, what was found due to him was due to him, exactly as what was due to William Frazier was due to him, and that it was due to him just as his original interest was, that is subordinate to his vendor's claim against him.

This court has the power to set aside that decree and opinion

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as erroneous, a re-hearing having been asked within the prescribed time. Whatever errors are therein should be corrected, but there is no opportunity to base one upon the other, for both are recorded and speak for themselves. The wrongs of James A. Frazier are properly redressed only against the party by whom he has suffered injury or loss; but as against the Campbell and the Randolph claims, &c., he has asserted no wrong and asked no redress.

The purchase of C. R. Mason was upon an arrangement with the creditors and persons in interest other than James A. Frazier. I dissent from the opinion in so far as it holds Mason a mere nominal actor upon the scene. Whatever his first connection with the case, he bought the property at a price certain but little over half of what James A. Frazier had bought it at some years before. That sale was to compel James A. Frazier to make good his purchase, or suffer a sale of the premises. Why should not the same rule of procedure and of responsibility attach to Mason as to James A. Frazier, with whom he had made no arrangement for his share? Mason bought the property, and the court confirmed it to him.

Now, if Mason paid, by an arrangement, the debts of all the parties in interest by getting up a company and taking some stock, and paying off in stock, except the Campbells, who did not take stock, and James A. Frazier, who did not take any thing, but got a decree of this court for what was supposed to belong to William Frazier, why should not Mason be held responsible, so far as he agreed to be held, for \$134,000, part to the Campbells in first mortgage bonds, stock to those who agreed to take stock and money, or what he could use, to satisfy James A. Frazier's interest; and if a re-sale is necessary, why is not Mason bound to make good his \$134,000, or pay the difference. He did not make any arrangement with James A. Frazier. He agreed, so far as James A. Frazier is concerned, to pay \$134,000 for the property; and upon a re-sale he should have credit for the interests he had paid, or which the Rock-

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bridge Alum Springs Company, his substitute, has paid, and be charged with the residue for which the property is responsible.

As to Randolph, and others situated like he is, if the purchase of the company stands, he has taken stock, but if this court overturns and destroys the company, so that there is no company, then his rights survive against the Springs property; and if Mason is protected as to his share, it is solely because of some contracts which they have mutually made.

But as the Campbells never agreed to take any thing but a first lien, they still have it. So James A. Frazier, who never agreed to take anything but money for his share, and stood off upon his legal rights, as he had a right to do, so his interest, as ascertained in this court, survives to him, and his interest is due to him without any reference to what was the convention between Mason and William Frazier. Mason was his security on the first purchase, and when their interests became divergent, Mason had a right to look out for himself, and buy at \$134,000 the same property James A. Frazier had bought at \$232,000 a few years before.

James A. Frazier could demand only his legal rights, and these being ascertained without a sale, his interest would be credited to him as purchaser, but after a sale, become part of the purchase money, and are due by the purchaser to the person to whom it is due; and if C. R. Mason is held to be bound for the amount due James A. Frazier, it must be inside of and in accordance with the terms of his purchase.

I think the settlements between James A. and Wm. Frazier in this court on the former appeal were final as between them, and that the circuit court erred in allowing the account to be re-opened for items claimed to be omitted.

The decision as to costs in this case is a solecism. If the parties were not interested in the appeal, let it be explained how they lost their interest by the appeal. They were not properly held liable for costs, because they were not contesting the claim of the appellant, and so they must not pay any part of

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the costs; but yet the effect of the decree in the suit in which they were parties, only nominally, is to deprive them of their entire interest in the property. This I say is a solecism.

I dissent from the opinion entirely, on every point. I have thus briefly written out my views in the case that my attitude may be understood when the two appeals are considered together. I feel that my views are correct and just to all the parties in interest, so that each party may stand by the consequences of his own contract and no other.

DECREE AMENDED AND AFFIRMED.

Richmond.

BARBOUR V. THE COMMONWEALTH.

MARCH 12th, 1885.

1. **WITNESSES - Disqualification.**—Conviction of petit larceny does not in this State disqualify one as a witness.
2. **IDEM—Impeachment.**—A witness cannot be impeached by proof of particular acts and offences committed by him.
3. **CRIMINAL PRACTICE—Evidence.**—Evidence that the hands, knife, &c., of the prisoner were smeared with blood immediately after the homicide, is admissible, though there was no chemical analysis.
4. **IDEM—Idem—Cumulative.**—After the argument has commenced it is too late to admit mere cumulative evidence.
5. **IDEM—Counsel—Prisoner's Statement.**—Much latitude is allowed counsel in argument, but they should not relate to the jury the prisoner's version as the *statement of the accused*, where the latter could not himself testify.
6. **IDEM—Case at bar.**—The facts exhibit a case of murder in the first degree.

Error to judgment of circuit court of Albemarle county rendered May 17th, 1884, and sentencing to death by hanging, one Joseph Barbour, who had been found guilty of murder in the first degree, by the verdict of the jury upon the trial of an indictment for the murder of one Randall Jackson.

Opinion states the case.

Davis & Harman, for the plaintiff in error.

Attorney-General F. S. Blair, for the commonwealth.

LACY, J., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of Albemarle county, rendered at the May term 1884. The plaintiff in error was indicted, tried and convicted of murder in the first degree, for the killing of Randall Jackson on the 17th day of November, 1883.

Upon his arraignment in the county court, the plaintiff in error elected to be tried in the circuit court, in which court he was tried accordingly. Upon the trial numerous exceptions were taken to the rulings of the circuit court. The first exception, and first assignment of error here, was as to the admissibility of the evidence of Robert Lewis, the only witness to the killing. The objection to the admission of the testimony of Robert Lewis was based upon the fact that he had been convicted of petit larceny, and the record of the conviction was offered to sustain the objection; but the court rejected the record of the conviction of the said witness, and admitted him to testify in the case. This is the question to be disposed of first in this case here. Does a conviction of petit larceny disqualify a witness from testifying in any future case?

By the common law a person convicted of an infamous offence was incompetent afterwards to be a witness. These offences were treason, felony, and all offences founded in fraud, and which come within the general notion of the *crimen falsi* of the Roman law.

Mr. Bishop says, speaking of this incapacity of a witness because of conviction of an offence deemed infamous: "As a consequence of the final judgment for treason, or felony, or any misdemeanor of the sort known by the term *crimen falsi*, whereof all are commonly called infamous crimes, we have the doctrine that persons convicted of any of these are not permitted to testify, when objected to, as witnesses in our courts. They are supposed to be so regardless of truth that it would be unjust to

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compel litigants to suffer from what they assert even under oath. Some embarrassment attends the attempt to particularize the crimes which are infamous within this rule. Larceny is, because it is a felony; so is the knowingly receiving of stolen goods; and so, at the common law, is even petit larceny.

“Larceny, such as is known as grand larceny, is a felony, and petit larceny is a misdemeanor; but before this distinction was recognized between grand and petit larceny, a party convicted of petit larceny was competent in England by the statute of 31st George III, chapter 35. And this distinction between grand and petit larceny is now well established by statute in many states, which render the crime of petit larceny no longer infamous.”

Mr. Bishop, in referring to this change of the rule as to petit larceny in some of the states, by operation of statutes which renders that crime no longer infamous, cites the decisions of the courts of New York, Indiana, Kentucky and Virginia. (Citing upon this question the case in this court of *Uhl v. The Commonwealth*, 6 Gratt., 706. In that case the circuit court rejected the evidence of the former conviction of the witness for petit larceny, and permitted him to testify; and in that case this court refused the writ of error asked for. But there is no opinion filed.

The effect of that decision, it is claimed, is weakened by the fact that the conviction for petit larceny of the witness was in another state; but the decision does not appear to rest upon that ground, because throughout our laws convictions in other states, anywhere in the United States, are expressly recognized, it being provided that a conviction of a person of petit larceny, formerly convicted in the United States, &c., shall be punished, &c.

In the state of Maryland there are numerous decisions, ancient and modern, enforcing this incapacity to testify upon convictions in other states and countries, and upon reason it would seem that a person would be as much degraded by con-

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viction of an infamous offence in one state as in any other. The courts have not uniformly decided this question the same way. In some states the conviction in another state is not recognized in the determination of this question.

Uhl's case was decided in 1849, and the Statute of 1847-8 provided for the cases in which conviction for infamous offences should disqualify a witness. It is there provided, that "a person convicted of felony shall not be a witness, unless he has been pardoned or punished therefor," &c.

Offences punishable by death or confinement in the penitentiary under our law are declared to be felonies. All other offences of every sort are grouped together by the legislature and called misdemeanors. Petit larceny is a misdemeanor, the punishment of which is prescribed by statute, and by express enactment of the law it can be punished in no other way than as is prescribed by statute.

The common law rule as to disqualification of a witness, on account of previous conviction of an infamous offence, has been suspended in this state by statutory enactments, as indeed it has been to a great degree in England by acts of Parliament; and while it is otherwise in some of the states, in Virginia a conviction for petit larceny does not disqualify a witness from appearing as such in a case, and the circuit court having properly so decided, the first exception must be overruled.

As to the second exception, the attempt of the plaintiff to impeach the witness, by proving particular acts and offences, committed by him, was properly overruled by the circuit court and his efforts properly limited to proof of general character for truth, etc.

The hand of the accused appearing immediately after the homicide to be stained on the inside and the outside, and daubed between the fingers with blood, and the knife in his pocket, with which the killing was done, being smeared with blood, so that it came off on the hands of all who touched it: the evidence of these facts was properly admitted, without any chemi-

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cal analysis to ascertain the obvious and indubitable fact that it was blood, and not simply something else that looked red, and looked like blood without really being blood.

The offer to re-open the evidence and introduce a witness to prove that the chief witness for the commonwealth was drunk the night of the homicide, after the argument had commenced and in great part concluded, was rejected properly by the circuit court. That question had been elaborately considered, and many witnesses examined concerning it during the trial, and the new testimony then offered was merely cumulative, and came too late.

The fifth ground of exception is, that the counsel for the accused was refused the leave of the court to detail to the jury the prisoner's account of the whole affair, *as the prisoner's statement*. This practice in this particular form has never prevailed in this state, and it does not commend itself. The accused did not have the right to testify as a witness in the case; he was entitled to be heard in his own defense, and to be confronted with his accusers, &c., but no good reason presents itself for introducing the practice of relating his version at second hand, *as his statement*, laid before the jury by his counsel, by leave of the court. Counsel for the accused in such a case in this state are allowed, and avail themselves of all possible latitude in making their arguments, and few of them it is reasonable to believe, ever fail to present to the jury the prisoner's version, with every possible inflection and variation. But until the legislature shall in its wisdom see fit to permit the accused to be sworn as a witness in his own behalf, there is no authority for the introduction of the practice here contended for.

The seventh exception is as to the refusal of the court to set aside the verdict and grant the prisoner a new trial, upon the ground that the evidence did not justify a verdict of murder in the first degree.

This motion was properly overruled, and is in fact disposed of by the foregoing. The case as made out upon the testimony of

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all the witnesses, the evidence of Robert Lewis being admitted, makes out a deliberate and willful murder, entirely without provocation of any sort, and is briefly this:

A peaceful citizen, unoffending in all respects, is walking along the highway on his way to his home and family, in company with three others. The prisoner, meeting with them just as they were leaving the little town where they had been to make their Saturday night purchases, after collecting their week's wages, requests one of them to return to the store, or whatever place it could be found, and take a drink. The deceased remonstrates, says his family is alone, and he must go on as it is getting late. The prisoner, without other provocation, thrusts a knife into his throat, with the remark, "what have you got to do with it." The death wound is then inflicted, the main artery in the neck is severed, and the artery in the arm so cut that it discharged its contents. The deceased cried out in his death agony, and the murderer fled, disguising himself as he flees by throwing away conspicuous parts of his dress; is quickly captured, reeking with the blood of his victim, and still clasping the bloody weapon; and offers no better excuse for the dark deed than that he was a stranger to the deceased.

Our statute declares, that any willful, deliberate and premeditated killing, is murder in the first degree. The evidence shows this act to be such a killing, and the verdict of the jury was right, and the court did not err in refusing to set it aside.

This disposes of the questions which are necessary to be specially considered. We do not perceive any error in the instructions given by the court in the case. Upon the whole case we are of opinion to affirm the judgment of the circuit court of Albemarle county.

JUDGMENT AFFIRMED.

Richmond.

PEAKE v. JENKINS.

MARCH 12th, 1885.

1. *WILLS—Attestation.*—Code 1873, chapter 118, section 4, requires the attestation of two subscribing witnesses, but no particular form, or place on the paper, yet the witnesses, unless the will be olograph, must subscribe *as witnesses*, though the word “witness” need not appear.
2. *IDEM—Case at bar.*—Instrument propounded as the will of J. is wholly written by H. and signed “J. by H.” and is attested “Witness: L.” L. being dead, the instrument is probated on the testimony of H. as a subscribing witness.

HELD :

1. The instrument was not attested pursuant to the statute.
2. H. did not subscribe “as a witness,” and could not attest the will.

3. *IDEM—Testamentary—Case at bar.*—Instrument dated 13th April, 1870, speaks of “the testatrix” in the third person, and merely recites that she had spoken to the amanuensis “of her wish to make a will to secure to her son J. \$200 a year for every year he had been staying at home with her since his father’s death,” and that on 3rd of January, 1870, she had asked the amanuensis “to write her will for her to copy,” &c.

HELD :

The instrument is not testamentary in its character.

4. *IDEM—Cases compared.*—*Pollock v. Glassell*, 2 Gratt., 440, is distinguished from case at bar in that, though there the name of the witness was put to the paper, not as a witness, but for some other purpose, yet the testatrix requested the witness to alter the paper, and the witness adopted her signature already there; whilst here, the witness signed as amanuensis, and was not requested to attest the paper.

Statement—Opinion.

Error by Louisa J. Peake and others, from the judgment of circuit court of Louisa county, rendered March 22nd, 1884, whereby an instrument of writing, dated April 13th, 1870, propounded by John B. Jenkins, was admitted to probate as the last will and testament of Anna L. Jenkins, deceased.

Opinion states the facts.

J. G. & W. W. Field and *J. L. Powell*, for the appellants.

Pettit & Leake, for the appellee.

FAUNTLEROY, J., delivered the opinion of the court.

The paper-writing in controversy here, is in the words and figures, to wit:

“My mother has several times spoken to me of her wishes in relation to my brother John. She says father, in his lifetime, said he wanted John to have two hundred dollars a year for staying at home to nurse and take care of them in their old age, but she told me she had never had it in her power to pay him anything, and it is her [will] wish that he shall be paid two hundred dollars per year for every year he has been staying at home with her before and since father's death. She has frequently spoken of it to me, and said she wished to make a will to secure John what she considered his just dues, but being so out of the habit of writing, she has deferred it from time to time, and several times asked me to do it for her. I was willing to do so, but told her I supposed her wishes expressed through me would be all that was necessary, as all her children knew how it was, and, I supposed, would respect her wishes in the matter. The third of January, 1870, she asked me again to write her will for her to copy, saying she had now arrived at an age when she might expect to die suddenly, and she wished her children and her heirs to do justice to John, as

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he had nursed both father and herself for so many years of his life.

“ANNA L. JENKINS,
“April 13th, 1870. “By MARY F. HOLLADAY.
Witness,
LUCY P. B. LIPSCOMB.”

No portion of this paper was written by Anna L. Jenkins; nor was it signed by her. The signature was written by Mary F. Holladay, who also wrote the paper, and affixed her own name to the signature, as the *amanuensis* of Anna L. Jenkins. There is but one attesting witness, the name of Lucy P. B. Lipscomb, on the left hand side of the paper, under the word “*witness*,” in the singular number. The original paper itself has been brought up, and is submitted as part of the record. An inspection of it, with the naked eye, reveals very much to discredit it as a genuine paper; and to make doubtful the testimony of the two only witnesses introduced by the propounder of the paper asserted as the will of Anna L. Jenkins.

The word *will* is interlined in the body of the paper, and both it and the word *witness*, over the signature of Lucy P. B. Lipscomb, are in handwriting diverse from each other, and different from the handwriting of the instrument itself, by Mary F. Holladay, and that of Lucy P. B. Lipscomb; while all these appear to have been written in different *ink*, and with different *pens*. These indicia suggest, irresistibly, that at least four different persons, at different times, have impressed that paper: Mary F. Holladay to write it and sign Anna L. Jenkins' name; Lucy P. B. Lipscomb to sign it as a subscribing witness; some person unknown to the record to write the word “*witness*” over Lucy P. B. Lipscomb's name; and some one, unknown, to interpolate the word *will*: whereas Mrs. Mary F. Holladay says, in her evidence to probate the paper, that there was no one present at the writing, signing and witnessing of the paper, except Lucy P. B. Lipscomb, herself, and Anna L.

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Jenkins; and that there was but one inkstand in the room, and that Mrs. Lipscomb used the same pen and the same ink that she did.

The propounder of the paper, John B. Jenkins, testifies, that *he* did not write the word *witness* over Lucy P. B. Lipscomb's name; and that he does not know who did. While the word *will* interpolated in the body of the paper, is wholly unexplained by any evidence in the record. But irrespective of these pregnant signs of suspicion and doubt of the genuineness of the paper, it is not executed in the mode prescribed and required by the statute in relation to the execution and attestation of wills and testaments. (Code 1873, chapter 118, sec. 4, p. 910.) It was written by Mary F. Holladay, and Anna L. Jenkins is signed to it by Mary F. Holladay, which so signing is indicative only of the personality or individuality of Anna L. Jenkins as the sponsor, maker or signer of the paper. This is the special purport, legal function, and one single significance of the addendum to the name of Anna L. Jenkins in the words, "By Mary F. Holladay."

The statute requires the attestation of two subscribing witnesses; and while no form or particular place on the paper is required, yet the witnesses to attest a will, not wholly written and signed by the testator, must sign the paper *as witnesses*; tho' the word, or description, "*witness*" need not surmount, or annex to, the names of the witnesses, nor is required to appear on the face of the paper itself.

Mrs. Lucy P. B. Lipscomb, the only attesting witness on the face of the paper propounded, is dead; yet Mary F. Holladay, who could never be known, from the face of the paper, as a witness to its execution and publication as the will of Anna L. Jenkins, was admitted by the circuit court to prove, by her own oral evidence, that she was (what the paper does not state or show) an attesting witness to the will, and was then allowed to prove its due execution. This, we think, was erroneous, and is in contravention of the special formalities prescribed by the

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statute, whose policy is to strengthen, and not to weaken, the barriers against fraud, by requiring strict legal proof of two credible, competent, chosen witnesses, whose names are signed to the will, at the time and in the process of its execution and publication, *as witnesses*.

An attestation to a writing may be either general or special, and if its special pertinency and office, or function, be manifest, and clearly expressed in plain, unambiguous terms, oral evidence is not admissible to give any other or additional office to the name of the attesting witness. Thus, the signature, to the paper propounded, of "Anna L. Jenkins, by Mary F. Holladay," is a *special* attestation by Mary F. Holladay to the *one fact* of her signing Mrs. Anna L. Jenkins' name for her, in obedience to the requirement of the statute, that "No will shall be valid unless it be in writing, and signed by the testator, or by some other person in his presence, and by his direction, in such manner as to make it manifest that the name is intended as a signature." It represents Anna L. Jenkins, and does not represent Mary F. Holladay for another purpose, and in the dual office of an attesting witness to the execution, acknowledgment and publication of the written instrument as and for the will of the maker—"Anna L. Jenkins, by Mary F. Holladay."

To declare this paper a *will*, duly attested, would be a dangerous precedent; and, though the courts have settled the practice of great liberality and indulgence in construing and *operating the intent* of testamentary papers, without strict requirements of form and technicality; yet, the express statute itself, and public policy, require strict legal proofs of prescribed formalities, as to the *factum* of a paper wholly written and signed, withal, by another than the ostensible maker, which, without the formalities prescribed by the statute, may be tortured and foisted into a will.

The case of *Pollock and wife v. Glassell*, 2 Gratt. 440, is cited and relied on, by counsel for appellee, as being in essential particulars, almost identical with this, and as ruling this case.

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The case of *Pollock and wife v. Glassell*, differs from the case at bar in the great and essential fact that, in that case, the testatrix, Mrs. Glassell, signed the writing (which was a codicil to her regularly made will, duly executed and attested as such, and disposing elaborately, and minutely and variously of large property, real, personal and mixed), with her own hand. Judge Baldwin, in delivering the opinion of the court, said, on page 463: "In the usual place for the names of subscribing witnesses, we find those of two persons, one below the other; the first put thus, "Written by S. S. Ashton;" the second thus, "Witness, Ann R. Ashton." * * * "The testatrix requested Ann R. Ashton to witness the paper, which she accordingly did; and then also requested S. S. Ashton to do so, but she thought and told the deceased, that it was not necessary for her to sign it again, as her name was already there, in the manner above stated." And, on page 465, he argues the sufficiency of the attestation by these witnesses, as required by the statute, "by a fair presumption arising from the local position of their signatures upon the paper."

The testatrix, Mrs. Glassell, having signed with her own hand, this codicil to her will, adapting its dispositions to the altered conditions, which had supervened since its long previous date and execution, called upon S. S. Ashton to subscribe the writing as one of the two required witnesses; and S. S. Ashton, first erasing by a mark of her pen, the word "for," as a prefix to Mrs. Glassell's signature, specially to attest the fact that she had signed the writing for Mrs. Glassell, adopted her signature, already on the paper in the accustomed place for attesting witnesses and over that of the other attesting witness; and thereby avowed herself to be, and was expressly accepted by the testatrix, as a general attestant to the will as a duly executed testamentary paper.

Not so, in the case at bar; Mrs. Anna L. Jenkins never wrote the paper and never signed it, except vicariously "*by Mary F. Holladay*," whose name is only thus impressed on the

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paper, specially to attest that she had signed Anna L. Jenkins' name, and for no other or different signification or effect.

The paper legally and logically declares on its face, that Lucy P. B. Lipscomb is the only witness who subscribed it as a witness to it as Anna L. Jenkins' will: and any other person than Mary F. Holladay might just as properly and admissibly have been allowed by the court of probate to be introduced to attest the paper propounded as the will of Anna L. Jenkins, as Mary F. Holladay.

But suppose the paper to be genuine, it is of more than doubtful import as a testamentary instrument; and Mary F. Holladay—who we think was improperly admitted to attest it as the will of Anna L. Jenkins—said upon the stand in the probate court, in answer to the question, “Whether Mrs. Jenkins meant that paper for her last will, or as a memorandum from which her will was to be written?” that, *she did not know. She never heard her say anything about it.* And in 1871, she filed a sworn answer in the suit of *Peake, &c. v. Jenkins*, in which she alleged that Anna L. Jenkins died *without a will*—“that there was no will.” She says after writing and giving the will to her mother, she never saw or thought of the will again until a month or two before she gave her deposition in a suit, ten or twelve years after Anna L. Jenkins' death, against her estate for services, by this very John B. Jenkins, the propounder of this paper-writing as the will of Anna L. Jenkins; he having, like Mary F. Holladay, sworn in the same suit, that Anna L. Jenkins *had died intestate*. Anna L. Jenkins died 24th December, 1870. The paper-writing propounded as her last will bears date the 13th of April, 1870; and Mary F. Holladay swears that she wrote and signed it for Anna L. Jenkins on that day.

The paper-writing has no testamentary feature on its face; it appears to be (even it were relieved from the suspicious circumstances of its fabrication, custody and production), more than

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anything else, an acknowledgment in writing of a pecuniary obligation for alleged services, which, if it had been delivered, would have been irrevocable, and enforceable *inter vivos*. Mary F. Holladay speaks throughout the paper, from beginning to end; and it does not speak in the *present tense*; but is only recitative of Anna L. Jenkins' repeated former conversations with Mary F. Holladay, expressive of her solicitude about making "a will to secure John what she considered his just dues:"—the last time being January 3rd, 1870. It appoints no executor; it names nor refers to no other person, property, or thing; not one of her numerous other children and grandchildren; and makes no disposition of any single item or portion of her real and personal property. It is not endorsed as her will; and it is found, as John B. Jenkins, the would-be beneficiary of it, swears, by him, four years after his mother's death, in a bureau drawer, where his mother kept her caps. John B. Jenkins lived with his mother up to her death; and on the day of her death, in her own house, where she lay unburied, this John B. Jenkins bitterly bewailed, to Dr. Dillard, "that he had requested Mr. Bailly, a lawyer, to write a will for the said Anna L. Jenkins, and he had neglected to do so. And the said John B. Jenkins seemed to be greatly disappointed." After his mother's death he lived, and continues to live, with Mary F. Holladay. He sued his mother's estate for alleged services; and, in that suit, both he and Mary F. Holladay, swore that Anna L. Jenkins had died without having made a will, *and filed this paper-writing* in that suit. In February, 1883,—thirteen years after his mother's death—he propounded this paper-writing as and for his mother's will, and proves its execution, as such, by Mary F. Holladay: the only subscribing witness on the face of the paper, Lucy P. B. Libscomb, being dead, and unable to answer any questions.

Now, looking at that paper-writing, breathing as it does the most intensely wrought-up solicitude of Anna L. Jenkins to

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secure "to John his just dues," which Mary F. Holladay swears she wrote and signed for Anna L. Jenkins, at her oft-repeated and most earnest request, and the writing of which satisfied and made easy the motherly solicitude of Anna L. Jenkins, then eighty-seven years old, can the *weakest* or the *strongest* credulity believe, that upon the death of this aged mother, only a few months later, Mary F. Holladay could have utterly forgotten this paper and its purpose, and should have never mentioned its execution to John B. Jenkins, or thought of it, until ten years and more, when Mary F. Holladay saw it only a few months before she gave her deposition in aid of John's suit against his mother's estate for the alleged services, which this pretended paper recognizes and provides for as the will of Anna L. Jenkins?

John B. Jenkins swears that he never heard of the existence or execution of the paper until he found it in the bureau-drawer, where his mother kept her caps, three or four years after her death; that he left it where it was, and, in 1883, he produces it—such as it is—mutilated and interpolated—bearing the impress of the handwriting of at least four persons, and indicating the use of different inks and pens and times. The story of this paper, as given in the evidence of Mary F. Holladay and John B. Jenkins to probate it as the will of Anna L. Jenkins, staggers intelligent belief, and is incompatible with human experience.

We are of opinion that the circuit court of Louisa county erred in holding in its order of March 22d, 1884, that the paper-writing, dated April 13th, 1870, which is produced and propounded by John B. Jenkins for probate in said court, as the last will and testament of Anna L. Jenkins, is testamentary in its character, and was duly executed by Anna L. Jenkins, deceased, as and for her last will and testament; and in deciding, adjudging and ordering the said paper-writing to be admitted to record as her true last will and testament; and the said order

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and judgment of the said circuit court must be reversed and annulled.

LEWIS, P., and RICHARDSON, J., concurred in the opinion.

LACY and HINTON, Js., concurred in the results.

JUDGMENT REVERSED.

Richmond.

SEYMOUR v. GOODRICH.

MARCH 12th, 1885.

1. NUDUM PACTUM—*Part for whole*.—An unsealed agreement to accept a smaller sum than the entire debt, does not bind the creditor.—*Pinnel's case*, 5 Coke's R. 117 a. But this technical rule is now in disfavor.
2. COMPROMISE—*New elements*.—Where a new element enters into the agreement to take a part for the whole, the entire debt is satisfied; *e. g.* a promise to pay at an earlier day, or at a different place, or in another thing than that stipulated for it in the original agreement, or a promise by a new party to pay.
3. IDEM—*Case at bar*.—M. S. and others of the firm of A. C. & Co., owed \$2,000 to G.; W. agreed to pay, and paid G. \$400, on G's promise to release M. and S. from the debt.

HELD:

The agreement was binding on G., and M. and S. were released.

Appeal from decree of corporation court of Norfolk city, entered December 27th, 1882, in attachment suit of D. A. Goodrich, assignee of late firm of Goodrich & Hendricks, plaintiffs, against M. T. Seymour, S. M. Seymour, Andrew Coyne, A. Wallace and others, defendants. The defendants, under their firm name of A. Coyne & Co., were indebted to the firm of Goodrich & Hendricks in the sum of over \$2,000. The creditor firm agreed with William T. Seymour, a brother of the debtors of that name, if he would pay them the sum of \$400 to release his brothers from liability for that debt, and that sum was accordingly paid by W. The evidences of the debt were nevertheless assigned to D. A. Goodrich, a member of the firm of Goodrich & Hendricks, and he afterwards brought suit thereon

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to recover the balance of the debt, and attached the property of M. T. Seymour for that purpose. The corporation court ordered the sale of the property, and the said M. T. Seymour appealed. Other questions were raised and discussed, but the decision rested on the validity of the agreement to release upon paying a part for the whole.

W. G. Elliott, for the appellant.

Godwin & Martin, for the appellees.

HINTON, J., delivered the opinion of the court.

The principal question in this case, and the only one we deem it necessary to consider, is, whether there has been such a partial payment of the debt due by the firm of A. Coyne & Co., of which the appellant was a member, to the firm of Goodrich & Hendricks, of which the appellee D. A. Goodrich is assignee, as will operate as an extinguishment of the debt so far as the appellant M. T. Seymour and his brother S. M. Seymour are concerned.

The general doctrine to be deduced from the authorities from *Pinnel's case*, 5 Coke's R. 117 *a*, down to the present time, seems to be, that an agreement to accept a smaller sum in lieu of a liquidated and ascertained debt, made between the debtor and creditor, is a mere *nudum pactum*, and not binding upon the creditor, and, therefore, he may accept the part and immediately sue for and recover the rest, notwithstanding his express, but unsealed, promise to release the debtor from the payment thereof. But this rule, being highly technical in its character, seemingly unjust, and often oppressive in its operation, has been gradually falling into disfavor; and the courts have therefore not only confined its operation strictly within its own narrow limits, but have seized upon every possible opportunity to evade its application. As a consequence, it has

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been generally, if not universally, held that where any new element entered into the agreement of compromise—as where an earlier day is fixed for the payment, or a different place selected therefor, or where the payment is made in some other thing than what was originally contracted for, *e. g.*, a chattel, or personal services, it will amount to a satisfaction of the whole debt, if the parties so agree. *Bliss v. Charter*, 5 Day, 359; *Gaffney v. Chapman*, 4 Roberts, 275; *Watkinson v. Ingleby*, 5 John. 386; *Bowker v. Harris*, 30 Vt. 424; *Bull v. Bull*, 43 Conn. 455; *Perkins v. Lockwood*, 100 Mass. 249. And in *Goddard v. O'Brien*, reported in the 21st Vol. Am. Law Reg. (N. S.) 638, S. C. L. R., 9 Q. B. Div. 37, the court carried this distinction so far as to hold that an acceptance of a check for £100, payable on demand, was a good accord and satisfaction of an indebtedness of £125 7s 9d, then due and payable, for the reason that the check was a negotiable instrument; thus holding, in effect, that the supposed advantage to be derived from the negotiability of the check for a part of the indebtedness, was a sufficient consideration for a relinquishment of the remainder. *Foakes v. Beer*, L. R. 9 App. Cases, 605. And so, where the creditor receives part of his debt from a third person upon the faith of the creditor's promise that the debtor shall not be pursued for the balance, the right to such balance is discharged without a release under seal, for in such a case, the recovery by the creditor of the balance would be a fraud upon the person who has been induced to part with his money upon the faith of the promise that the debtor should not be further molested, which the courts will not countenance. *Welby v. Drake*, 1 C. & P. 557; *Lewis v. Jones*, 4 B. & C. 506.

Now applying the principles of these cases to the facts of the case in hand, it seems to us clear that there has been a discharge of the whole indebtedness due by the firm of A. Coyne & Co. to the firm of Goodrich & Hendricks, of which indebtedness the appellee, D. A. Goodrich became assignee with full knowledge of this fact, at least so far as the appellants, M. T.

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Seymour and S. M. Seymour, are concerned. For here payment was made in the checks of a third party, at the instance of this assignee acting for the firm of Goodrich and Hendricks, of which he was a member, and they were payable to the order of that firm; and these checks were simply transmitted through M. T. Seymour, as agent for the drawer. It is clear, therefore, that M. T. Seymour, who is admittedly the owner of all the property attached in this cause, is entitled to so much thereof, if any, as may remain in kind, and also to the proceeds of sale of such as has been sold, and that the bill must be dismissed as to the Seymours. And as, under the facts of the case, it appears that the court had no jurisdiction of the cause, save by virtue of the attachment, all of the defendants being non-residents, we think that the decree of the corporation court of the city of Norfolk must be reversed; that the attachments must be abated, and the attached property or its proceeds must be restored to the appellant, M. T. Seymour; and that the bill must be dismissed, without prejudice, however, to any suit that the said Goodrich may be advised to hereafter institute against the said Wallace and Coyne.

DECREE REVERSED.

Richmond.

MOORE v. ULLMAN AND ALS.

MARCH 19th, 1885.

1. FRAUD—*Proof—Case at bar.*—The evidence of fraud must be sufficient to satisfy the conscience of the court, but may, and generally must, be circumstantial. In the case here by such evidence fraud is proved.
2. PRACTICE IN CHANCERY—*Answers.*—The testimony of one witness, with corroborative circumstances, or circumstances alone, or documentary evidence alone, may overcome an answer that is responsive to the averments of the bill. *Jones v. Abraham*, 75 Va. 466.

Appeal of J. S. Moore from decree of the chancery court of the city of Richmond, entered May 10th, 1883, in the cause wherein said Moore was plaintiff, and E. Ullman, M. Block, J. Baach and others were defendants. Court below dismissed the bill of Moore praying that a certain deed made by Baach to Ullman, trustee, to secure a debt to Block, be set aside as fraudulent.

Opinion states the case.

Christian & Christian and *Witt & Caskie* for the appellant.

B. H. Nash, Guigon and *Cannon & Courtney*, for the appellees.

LACY J., delivered the opinion of the court.

The case is as follows: On the first day of July, 1882, the appellant, Moore, filed his bill against the appellees, charging that on the 16th day of March, 1882, the appellee, Jacob Baach,

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made a fraudulent deed of all his property to the appellee, Ullman, in trust, to secure a pretended and fraudulent debt to the appellee, Block; seeking by his bill to set aside this deed as intended to defraud him, the said Moore, of his debt against the said Baach, which amounted to \$4,000. That Baach owed Block nothing; that Block had an interest in the store as partner; that the appellee, Ullman, had accepted the trust, and was about to sell under the deed.

The injunction was awarded, Moore's bill was amended, the account of Moore against Baach filed. Ullman, Baach and Block all answered, the latter denying the allegations of the bill.

The depositions of Moore and Baach were taken, and of many other witnesses. Block did not give his deposition, nor did he file or put in evidence the notes or bonds which evidenced his debt; and the books of Baach, who was a merchant, were not exhibited.

The cause coming on to be heard in the chancery court of the city of Richmond, on the 10th of May, 1883, the judge of that court being of opinion that the charges of fraud and co-partnership, made by the plaintiff in his original and amended bills, are not sustained by the proofs in the cause, dissolved the injunction and dismissed the bills of the plaintiff.

From this decree Moore applied to this court for an appeal, which was allowed on the 26th of May, 1883.

The claim of Moore is not denied, but admitted, and is secured in the deed as a deferred debt, second to that of Block. Baach in his answer sets forth the debt due Block as based upon \$300, borrowed April 18th, 1867, and that Block being clerk in his store received a salary of \$20 per month and board, from January 1st, 1867, to January 1st, 1870. On the 13th of January, 1870, Baach executed his note for \$720, the exact amount of the salary. From January 1st, 1870, to 1876, the salary was \$300 per year, and a note was then executed for this sum, \$1,800. From 1876 to January 1st, 1880, the salary was

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\$360, and a note was given in 1880, for \$1,440; and then gave a bond payable twelve months after date. That at different times he had paid Block \$195, the times not now remembered by him. That he was always willing to pay Block, and able to do so up to January 1st, 1881, and Block was willing to leave his money with him, and his reverses came in 1880 and 1881, and continued until they overwhelmed him in 1882.

Block answered, and set forth the same ground for the indebtedness. He gives dates to the \$195 paid, and says \$100 was paid in 1880, as *part* of interest on the \$300 loan.

This debt to Block is claimed to be fraudulent and pretended, by the appellant. He offers evidence to show that Block came to his store from Germany in 1867, a youth about eighteen years of age, to live with Baach, who had married his sister; that he did not appear to have money; that he lived in the ordinary way, dressed neatly, was economical as could be expected for a person who lived in a store; could not have lived without drawing upon his small salary to some extent. That he never had claimed to have any money, and had sworn to his property returns year after year, listing only at the best a \$10 watch, and personal property in all at \$40; and for many years listed nothing. That while Baach had professed to owe him this account for salary for all the years from 1867 to 1880, for continuous and unbroken service as his clerk, that Block had not lived with Baach all the time during these thirteen years, but had been employed by a merchant in Richmond, named Gunst, for a year during this time—Baach's store being out in Chesterfield county, at the village of Midlothian, about twelve miles from Richmond.

There is certainly something very unusual in the account stated by Baach as due to Block, and secured in the deed. It is the salary of Block in full, month by month, for thirteen years. He had laid up *every dollar* of his earnings, and while he was thus saving of his money, he seemed to have never thought of interest when the salary was consolidated and a

note executed therefor. He says he collected \$100, part of the interest on the \$300. What became of the residue of the interest? None appears to be provided for in the deed when the bond is given in 1880. And how does it happen that this young man who was so careful of his salary for thirteen years, got none in 1880, 1881, 1882?

It is a damaging circumstance to Block, that when he is thus assailed, his debt put in jeopardy by these witnesses, that he stands by and says nothing. He had answered, and had a right to rely upon the weight of his answer.

But his answer is contradicted by many circumstances. If he did not live in Richmond one year in other business, during these thirteen years, he could have proved where he lived. If he had sworn that he had no personal property, when he in fact was the owner of thousands, *well secured*—if there was any explanation he was the person to give it. If he had other property than his salary, and chose to live on that, and not draw the salary for all these years, and give away the interest, he alone could prove it, his brother-in-law, Baach, having stated that he did not look into his pocket when he came to his house, and did not know whether he had money or not. And the bulk of the debt to Moore having been contracted a few months before the deed was made, for groceries to go into the store; he kept the store, and he might have explained how it was that the personal property had dwindled down to \$1,500 so suddenly. Are we not bound to presume that Block could not afford to go upon the stand and subject himself to cross-examination?

Justice Blatchford said, in the case of *Borden v. Johnson*, 107 U. S. S. C. R. 251: "Under all these circumstances, the omission of Johnson to testify as a witness for himself, in reply to the evidence against him, is of great weight. This case, on the whole, is brought within the principle asserted by Mr. Chief Justice Marshall, speaking for this court, in *Clark's executors v. Riemsdyk*, 9 Cranch, 153, as a case where the evidence arising

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from the circumstances is stronger than the testimony of any single witness."

Greenleaf states, as a rule, that the sufficient evidence to outweigh the force of an answer, may consist of one witness, with additional and corroborative circumstances, which circumstances may sometimes be found in the answer itself; or it may consist of circumstances alone, which, in the absence of a positive witness, may be sufficient to outweigh the answer even of a defendant who answers on his own knowledge. Greenleaf on Evidence, vol. III, sect. 289.

Judge Burks, in *Jones v. Abraham*, 75 Va. 466, cites this same opinion of Chief Justice Marshall, with approval; and cites 1 Dan. Ch. Prac. 843, note 7, 4th Amer. Ed., as declaring that the answer may be disproved from corroborating circumstances alone, or from documentary evidence alone.

In the case of *Rea v. Missouri*, 17 Wall. 543, the court says that it is not necessary to prove fraud "by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced."

As to the proof necessary to establish fraud, "it is not safe to undertake to define what degree or kind of proof will justify a court of equity in granting relief against fraud. For the proof must satisfy the conscience of the court, and no man would deem it prudent to attempt to define the extent of that indispensable qualification in a judge or a court, the requisite amount of his sense of justice. And men's views in weighing evidence are as varied as their forms or their features." 2 Story's Equity, vol. 1, sec. 190 *a*. The proof must be sufficient to satisfy the mind of the court.

While the court must be just as to the rights of the person charged with fraud, and cautious not to lend too ready an ear to the charge, the question must be justly and fairly considered with due regard to the rights of all parties.

We have briefly suggested the evidence of the plaintiff. How are we to explain the fact that Block suffers this attack to be

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made not only on his debt, but on his character for honesty in making false returns of his personal property, and does not come upon the stand and give his deposition to rebut these charges, and account for and explain the inconsistencies set up between his answer and the facts as they are said to exist. Did he live in Richmond one year, and work for Gunst, and yet Baach was good enough to pay him his salary just as though he were working with him? Or did Baach and he, when the salary was added up, and the note given, *forget* the year's absence, or was this year's absence all a mistake after all? Did he for so many years falsely return his personal property account while he was possessed of large property in good bonds? Why did he not come upon the stand and testify? Are we not bound to conclude with Mr. Justice Blatchford, that his failure to testify is a circumstance of great weight?

In the view we take of the case, it is perhaps not at all necessary to go into the question of partnership, but it is a circumstance to be remembered, that while Block, during the time his all was at stake, never once exhibited his bonds, and Baach, during the time he is said to have had Block for a partner, according to his own statement, had stopped paying Block a salary, and that his mercantile books and accounts are nowhere exhibited in the cause.

We think the fraud is established. We are satisfied that this debt to Block is an afterthought, and that this deed was made with the intent to defraud the appellant, Moore, the creditor of Baach, and is void, and should have been set aside as such, and relief granted to the said Moore, according to the prayer of his bill. And the decree of the chancery court dissolving the injunction in the cause, and dismissing the bill of the plaintiff, is erroneous, and the same will be reversed and annulled, and the cause remanded with instructions to reinstate the injunction, and to decree against the defendants the payment of the debt to Moore, and to proceed to final decree in the cause to that end.

Decree.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the chancery court of Richmond city, erred in its decree of May 10th, 1883, in deciding that there was no fraud in the trust deed of the appellee Baach to Ullman, trustee, and in dissolving the injunction in the cause and dismissing the bills of the plaintiff Moore, and that the said decree is wholly erroneous: it is therefore decreed and ordered, that the said decree be reversed and annulled, and that this cause be remanded to the said chancery court at Richmond, with instructions to reinstate the said injunction, to set aside the said trust deed from Baach to Ullman, trustee, as fraudulent and void as to the debt to Block, and to proceed to grant relief to Moore, the appellant, in accordance with the prayer of his bill, and to proceed in the said cause to a final decree therein, in accordance with the foregoing opinion and the views herein.

It is further decreed and ordered, that the appellees do pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here; which is ordered to be certified to the chancery court of Richmond city.

DECREE REVERSED.

Richmond.

EX PARTE, ROLLINS.

MARCH 19th, 1885.

1. HABEAS CORPUS—*Where it lies not.*—The remedy for mere errors in proceedings of courts of competent jurisdiction, is by writ of error or appeal, and not by writ of *habeas corpus*.
2. IDEM—*Where it lies.*—Where the proceedings, whether civil or criminal, under which a party is detained in custody are void, as where the court has no jurisdiction, or where the statute under which the proceedings are inaugurated is unconstitutional, the same are reviewable on *habeas corpus*, and the party may be discharged.
3. UNCONSTITUTIONAL—*Inter-state commerce.*—Sections 39 and 40, of chapter 1, of the revenue laws of Virginia, (Acts 1883-'4, p. 582), are unconstitutional, because discriminating in favor of publishers of books, &c., in this state, and against such publishers in other states, thus contravening clause 3, section 8, article 1, of the Federal constitution, which gives Congress the right to regulate commerce between the several states. *Webber v. Virginia*, 103 U. S. 344.

The petitioner, Rollins, was taken into custody by the sheriff of Roanoke county, under a writ of *capias ad respondendum*, issued from the clerk's office of the county court of said county, in an action of debt wherein the commonwealth was plaintiff, and the petitioner was defendant. The action was under Code 1873, chapter 34, section 87, which enacts that the penalties prescribed by the revenue laws, except those recoverable in the circuit court of the city of Richmond by existing laws, shall be recoverable by action of debt, presentment, indictment, or information, and is founded on the provisions of sections 39 and

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40, chapter 1, of the revenue laws (Acts 1883-'4, page 582). The object of the action was to recover a fine of \$100, which, it was alleged, the petitioner had incurred for receiving subscriptions for and furnishing books, &c., published beyond the limits of this state, without having obtained a license so to do, according to the provisions of said sections 39 and 40, which are as follows:

"39. Any person, other than a licensed merchant, who shall receive subscriptions for, or shall in any manner furnish newspapers, books, maps, prints, pamphlets, or periodicals, *printed or published beyond the limits of this state*, shall be deemed a book agent. * * * * Any person violating the provisions of this section shall pay a fine of not less than fifty dollars, nor more than one hundred dollars for each offence.

"40. A book agent shall pay for the privilege of acting as such, the sum of ten dollars." * *

The petitioner alleges, that at the time the said action was commenced, he was engaged in selling as agent, in the county of Roanoke, books printed and published beyond the limits of this state; and insists that the provisions of the statute imposing a tax on agents for the sale of books printed and published beyond the limits of this state—there being no such tax imposed for the sale of books printed and published within this state—are unconstitutional and void. He, therefore, further insists, that his arrest and detention are illegal, and prays to be discharged from custody.

Upon the filing of the petition, a writ was awarded commanding the sheriff of Roanoke county to have before the court the body of the petitioner, together with the cause of his detention, and to abide the order of the court. The sheriff's return sets forth that he holds the petitioner in custody under an order or process in an action of debt pending in said county as stated in the petition; that the petitioner at the time the action was commenced, was an agent engaged in selling books printed and published beyond the limits of this state, and that

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he had not obtained a license so to do, as required by law. To this return the petitioner demurred.

John E. Penn, for the petitioner.

Attorney-General, F. S. Blair, for the commonwealth.

LEWIS, P. (after stating the case), delivered the opinion of the court.

The first question is, whether, on the facts appearing by the return, the case is a proper one to be considered on *habeas corpus*.

It is a well-established and undisputed principle that mere errors in the proceedings of a court of competent jurisdiction cannot be reviewed on *habeas corpus*. In such case the remedy, if any, is by writ of error or appeal. But where the proceedings under which the party complaining is detained in custody are void, as where the court is without jurisdiction, the same are reviewable on *habeas corpus*, and the party will be discharged.

"If it appear," says Lord Hale, "by the return of the writ that the party be wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisoned, he shall be discharged." Bac. Abr., *Habeas corpus*, B-10; Hurd on *Habeas corpus*, 333.

It was on this ground that this court proceeded in *ex-parte Meredith*, 33 Gratt. 119, though the proceeding was really an amicable one to determine the title to the office of county judge of Prince William county. And the same principle is illustrated by numerous decisions of the Supreme Court of the United States.

Thus, in *ex parte Lange*, 18 Wall. 163, the petitioner was discharged on *habeas corpus* on the ground that he was illegally restrained of his liberty by virtue of a void judgment of a

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Federal court. See also *ex parte Siebold*, 100 U. S. 371; *ex parte Wilson*, 114 Id. 417.

On the other hand, in *ex parte Watkins*, 3 Pet. 193, the writ was refused, because the petitioner was in custody under the order of a court of competent jurisdiction, which was therefore conclusive on all other courts. So, on the same ground, the court refused to interfere in the following cases: *ex parte Kearney*, 7 Wheat. 38; *ex parte Parks*, 93 U. S. 18; *ex parte Virginia*, 100 Id. 339; *ex parte Curtis*, 106 Id. 371; *ex parte Yarbrough*, 110 Id. 651; *ex parte Crouch*, 112 Id. 178; *ex parte Bigelow*, 113 Id. 328.

In *ex parte Siebold*, *supra*, the writ was applied for to discharge the petitioner from custody, who had been indicted and convicted in the Circuit Court of the United States for the district of Maryland, under certain acts of Congress which were alleged to be unconstitutional. And the question arose, whether the court had jurisdiction to discharge a party imprisoned under sentence of a United States court upon a conviction of a crime created by and indictable under an unconstitutional act of Congress; and it was held that it had.

"The validity of the judgment," said the court, "is assailed on the ground that the acts of congress, under which the indictment was found, are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but illegal and void, and cannot be a legal cause of imprisonment. * * We are satisfied that the present is one of the cases in which this court is authorized to take jurisdiction. We think so, because, if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the case."

The principle there asserted fully sustains the jurisdiction of this court in the present case. There, it is true, the imprisonment complained of was by virtue of a final judgment in a criminal prosecution; here it is under original process in a civil

action. But the principle is in both cases the same. Formerly it was doubted whether *habeas corpus* was a proper remedy in case of arrest under civil process. *Ex parte Wilson*, 6 Cranch, 52. But such doubt, from whatever source it may have arisen, is no longer entertained.

In *Nelson & Graydon v. Cutter*, 3 McLean, 326, the defendants in a civil action were discharged on *habeas corpus*, on the ground that the affidavit was insufficient upon which the *capias ad respondendum* issued under which they had been arrested. And according to the rule acted on in that and similar cases, the true test is, whether the process is illegal and void, or irregular merely. If the former, then the party in custody is restrained of his liberty without due process of law, and is entitled to the immediate remedy of *habeas corpus*; but not so in the latter case. *Ex parte Randolph*, 2 Brock. 447, 475; *ex parte Rowland*, 104 U.S. 604; *Bank U. S. v. Jenkins*, 18 Johns. 305; Bac. Abr. *Habeas corpus*, B, 3.

The next question, then, is whether the provisions of the revenue laws, the validity of which is questioned in the present case, are, as alledged, unconstitutional. And upon this point there would seem to be no room for doubt, in view of several recent decisions of the Supreme Court of the United States.

In *Webber v. Virginia*, 103, U. S. 344, certain provisions of the revenue laws of this state, imposing a tax on the privilege of selling the manufactured articles or machines of other states or territories—there being no such tax imposed on the privilege of selling the manufactured articles or machines of this state—were held invalid, because repugnant to that clause of the Federal constitution which gives to congress the power to regulate commerce among the several states.

In the present case, the evident purpose of the legislature in enacting the sections of the statute in question was to discriminate in favor of the publishers of books, newspapers, periodicals, etc., in this state, and against those engaged in such business elsewhere. Thus all persons, other than licensed merchants,

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who receive subscriptions for, or in any manner furnish, books, newspapers, periodicals, etc., published beyond the limits of this state, are required to pay a license-tax, while no such tax is imposed for the privilege of selling the publications of this state. This is in effect imposing a tax on the publications of other states, and is to that extent a regulation of commerce in such publications between the states, and, therefore, in conflict with the constitution of the United States.

In *Webber v. Virginia*, *supra*, Mr. Justice Field, speaking for the court, said: "Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is upon their having been manufactured without the state, it is to that extent a regulation of commerce in the articles between the states. It matters not whether the tax be laid directly upon the articles sold, or in the form of licenses for their sale. If by reason of their foreign character the state can impose a tax upon them, or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the constitution intended to guard when they vested in Congress the power to regulate commerce among the several states." See also *Welton v. Missouri*, 91 U. S. 275; *County of Mobile v. Kimball*, 102 Id. 691; *Brown v. Houston*, 114 Id. 622; *Walling v. Michigan*, 116 Id. 446.

The ruling in those cases is decisive of this. The books, newspapers, periodicals, etc., printed or published beyond the limits of the state, and for the sale of which a license-tax is imposed by the revenue laws, stand on the same footing in this particular with the manufactured articles and machines of other states or territories. All are alike articles of commerce, and

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as such equally protected against discriminating regulations by authority of state legislation.

It follows that the petitioner is illegally in custody, and an order for his discharge will be entered accordingly.

FAUNTLEROY, J., and RICHARDSON, J., concurred in the opinion of LEWIS, P.

LACY, J., and HINTON, J., dissented.

PETITIONER DISCHARGED.

Richmond.

CHESTERFIELD COUNTY v. HALL'S EX'OR.

MARCH 19th, 1885.

1. JURISDICTION—*County courts*.—A county court acting under the statute authorizing county courts to purchase salt, is exercising a special authority, and it must appear from the record that the justices were summoned, or that a majority were present, when a bond was executed for salt purchased, or the bond will be held to be null and void. *Dinwiddie county v. Stuart, Buchanan & Co.*, 28 Gratt. 626.
2. IDEM—*Idem—Presumptions*.—Where a court of general jurisdiction has conferred upon it special powers by special statutes, which are only exercised *ministerially*, and not *judicially*, no presumption of jurisdiction will attend its judgments, and the facts essential to the exercise of the special jurisdiction must appear on the face of the record. *Pulaski county v. Stuart, Buchanan & Co.*, 28 Gratt. 872.

Error to the judgment of the circuit court of Chesterfield county rendered May 20th, 1882, on an appeal from the county court of said county, wherein a judgment had been rendered October 22nd, 1880, on an appeal from the board of supervisors of said county, on a claim presented to the said board by L. L. Lester, the executor of Wilkins Hall, deceased, founded on a bond alleged to have been issued by the said county court on the 9th day of June, 1862, for \$2,000, loaned to the said county by the said Hall, to purchase salt, under the act of the general assembly, passed May 9th, 1862. The board refused to pay the said claim. Upon trial upon the petition of Hall and the answer of the said county, the jury returned their verdict in favor of the county, and Hall's executor appealed to the cir-

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cuit court, where the said judgment was rendered reversing the judgment of the county court, and the said county obtained a writ of error to this court.

The opinion states the other facts.

B. A. Hancock and *F. W. Christian*, for the plaintiff in error.

Meade Haskins, for the defendant in error.

FAUNTLEROY, J., delivered the opinion of the court.

This is a writ of error to an order of the circuit court of Chesterfield, entered 20th day of May, 1882, in a proceeding on appeal from the county court of Chesterfield, wherein L. L. Lester, executor of Wilkins Hall, deceased, was appellant, and the county of Chesterfield was appellee. The record presents the following case:

On the 18th December, 1878, L. L. Lester, as the executor of Wilkins Hall, deceased, presented for payment to the board of supervisors of Chesterfield county, a claim for \$2,000, with interest from 9th of June, 1862, which he alleged to be due to him by virtue of a bond of the said county, which it was claimed the said county had issued in the year 1862, under the provisions of an act of the general assembly of Virginia, passed May 9th, 1862, and known as the "Salt Act;" which said bond it was claimed the said county had executed and delivered to the said Wilkins Hall in his lifetime. The board of supervisors of Chesterfield county, being of opinion that there is no liability on the county, by reason of the said asserted claim, rejected and refused to pay it: from which decision and action of the said board of supervisors, the said Lester, executor, &c., took an appeal to the county court of Chesterfield. In the said court the case was tried before a jury; who, after a great deal of evidence introduced, and sundry instructions given by the court, and argument of counsel, came into court and ren-

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dered a verdict in favor of the county. The counsel for the plaintiff, Lester, executor, thereupon moved the court to set aside the verdict, and grant them a new trial; but the court overruled the motion, and entered judgment for the defendant county, pursuant to the verdict of the jury. From this judgment of the county court, the said Lester, executor, took an appeal to the circuit court of Chesterfield; which said circuit court reversed the said judgment of the county court, set aside the verdict of the jury, and ordered a new trial to be had in the said circuit court. From which said action of the circuit court the case is now here, by appeal allowed to the said county of Chesterfield.

This case has arisen under section 1 of an act of the general assembly of Virginia, passed May 9th, 1862, entitled "an act to authorize the county courts to purchase and distribute salt amongst the people, and provide payment for the same;" which said section is in the following words:

"§ 1. Be it enacted by the general assembly, That the courts of the several counties of this commonwealth, when a majority of the acting justices of the county is present, or when the justices have been summoned to attend to act upon the matter, are hereby authorized and empowered to order the purchase, for the use of the people of said counties respectively, such quantities of salt as the said courts may deem necessary, and to provide for the payment of the same, by county levies, or by loans negotiated upon the bonds of said counties, to be redeemed by county levies or otherwise."

Numerous cases have arisen since the close of the late civil war, upon contracts entered into by the county courts of this commonwealth under the authority of this act; and the case of *Dinwiddie County v. Stuart, Buchanan & Co.*, 28 Gratt. 526, and the case of *Pulaski County v. Stuart, Buchanan & Co.*, 28 Gratt. 872, are directly and pointedly conclusive of the case under review. In the *Dinwiddie* case there was a bond of the county, under seal of the county court, and in legal form and effect.

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Judge Christain, in delivering the opinion of the court, said, "But this paper is invalid as a *bond of the county*, because it does not appear in the record, that at the court at which it had been executed the justices had all been summoned, or that a majority were present. * * It cannot be *presumed* in a case like this, that the justices had been summoned: this ought to appear affirmatively, and the record should show that a majority were present. The court was acting upon a matter of special jurisdiction, conferred by a special statute, and upon a matter outside of its general jurisdiction. The case does not, therefore, come within the doctrine declared by this court in *Ballard et als v. Thomas & Ammon*, 19 Gratt. 14. Here the jurisdiction was special, fixed by a special statute, and must be exercised in accordance with the provisions of the statute; that is, either when the justices have all been summoned, or when a majority were present. The proceeding in this case (the execution of a bond) *not being a judicial proceeding* within its ordinary jurisdiction, must be shown affirmatively to be *strictly* within the provisions of the statute within which the proceeding was had."

In the *Pulaski* case, (*supra*) the same Judge, *Christain*, said, for the court, "While it is true that the county courts, which were clothed by the act of May, 1862, with the power to purchase and distribute salt, were courts of general jurisdiction, yet such power did not belong to it as a court of general jurisdiction, but was a special summary power, conferred by statute. It was a power *purely ministerial*, and was not exercised judicially, according to the course of the common law. * * Certainly the power to purchase salt, and bind the people of the several counties for its payment, was not judicial power, to be exercised according to the course of the common law. It was a special and extraordinary power, to be exercised ministerially and not judicially. It was natural and proper, in the highest degree, that the legislature should throw around the exercise of this extraordinary power, by which the county courts

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could bind the people of the several counties of this commonwealth to the payment of millions of dollars, all the checks and restraints possible, to secure its judicious exercise. In a matter like this, purely ministerial, and in which all the people of the counties were interested, the justices of the peace were, in a certain sense, the representatives of the people, and as such were to judge both of the necessity of appropriating the people's money, and the extent of such appropriation. To give validity to such action of the county court, the conditions prescribed by the statute must be complied with, *and it must so appear upon the record*. The facts essential to give the court jurisdiction must appear affirmatively, and *no presumption* of jurisdiction will attend the judgment."

In the case before us, there is no pretence that all the justices had been summoned to attend the June term, 1862, of the county court of Chesterfield, "*to act upon the matter*" of ordering the purchase of salt for the use of the people of Chesterfield county, and to provide for the payment of the same by county levy, or by loans, to be negotiated upon the bonds of the said county, &c., as specifically provided in the statute known as the "Salt Act"—already cited.

But it is contended by the appellee here, (who was appellant in the circuit court,) that a majority of the acting justices was present, and constituting the county court of Chesterfield.

On the 9th day of June, 1862, when it was "Ordered, That bonds of this county, to the amount of nine thousand dollars, bearing six per cent. interest from date, be issued for the purchase of salt, said bonds to be issued and signed as the bonds heretofore issued, and payable one year after date."

At a court held for Chesterfield county, May 13th, 1861, the following order was made: "Be it ordered that the bonds proposed to be issued in the foregoing report, this day unanimously adopted by the court, shall be signed by the presiding justice, and countersigned by the clerk of the court, and to issue in such sums as the said officers may think advisable from time to

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time, and that the clerk shall keep a register of all the bonds issued, their respective amounts, and the agents or parties to which they have been delivered."

The clerk of the county court certifies that the records in his office show that at the June term, 1862, of the said county court of Chesterfield county, there were twenty-four acting justices of the said county. Of these, one, William B. Chalkley, had accepted a commission as postmaster, under the Confederate states government, and the county court instructed the jury, at the request of the plaintiff, (who is the appellee here,) that the said Chalkley could not be regarded as an "acting justice." Of this the plaintiff could not complain, though the record shows that Chalkley continued to act as a justice of the county. This reduced the number of acting justices to twenty-three, and the plaintiff below claimed that the record showed that twelve were present on the 9th of June, 1862, when the order was entered on which this asserted bond was based.

The record shows that the county court of Chesterfield county, at its session on the 9th of June, 1862, transacted a great amount and variety of business, and that during that day the composition of the court—both as to numbers and individuals—changed three times. It began with three justices, and transacted a great deal of business, and then the following entry appears: "Present—Gentlemen Justices L. L. Lester, Healey Cole, W. Tucker, R. L. Jones, V. Markham, F. G. Hancock, William B. Gates, H. R. Graves and Edward Williams."

"Ordered, That James H. Cox and Alex. Sims be and they are hereby appointed commissioners to obtain from the salt works, in Washington county, the proportion of salt which the law authorized them to furnish this county; and that having obtained the same, they are further authorized to select a place or places for deposit, and by advertisement notify the public of the place or places for distribution.

"Ordered, That Alex. Sims, having given bond as the law

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requires, be appointed agent of this county to obtain from the salt works the quantity of salt to which this county is entitled.

“Ordered, That bonds of this county, to the amount of nine thousand dollars, bearing six per cent. interest from date, be issued for the purchase of salt; said bonds to be issued and signed as the bonds heretofore issued, and payable one year after date.”

This record affirmatively shows that the court was composed of the nine justices who are recorded by the clerk as being “*Present*,” and, upon the legal and logical maxim, “*expressio unius, est exclusio alterius*,” it not only fails to show that any others than those named were present, but it excludes the inference.

Nevertheless, it is claimed by the appellant that it is to be *presumed* that the three justices who are recorded as being “*present*” at the opening of the court on the 9th of June, 1862, were likewise *present*, at the reorganization of the court, to take action under the “Salt Act.” This, it seems, is a violent presumption in the teeth of the record of those who were “*Present*,” and of the fact, shown by the record, that the court was organized *four different times* on the 9th of June, 1862, according to the requirements of the large and varied business of the court on that day. But we have already quoted from the opinion of this court, in the case of *Dinwiddie County v. Stuart, Buchanan & Co.*, and repeated in the case of *Pulaski County v. Stuart, Buchanan & Co.*, that no *presumption* can come in aid of the record of the court, acting under the special summary jurisdiction conferred by the statute; “that to give validity to such action of the county court, the conditions prescribed by the statute must be complied with, and it must so appear upon the record. The facts essential to give the court jurisdiction, must appear affirmatively, and no presumption of jurisdiction will attend the judgment.”

The plaintiff below contended, and attempted to show, that there were only seventeen “acting justices” in the county of Chesterfield on the 9th of June, 1862. To do this, he at-

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tempted to prove that one of them, Robert S. Winfree, was dead at that date, but he failed to prove it; and the certificate of the clerk, already cited, proves that he was alive and one of the twenty-four acting justices of Chesterfield county on that date. It was proved that Walter G. Clarke, Charles B. Vaden and Joseph T. Mason entered the Confederate military service early in 1861, tho' it was proved that W. G. Clarke acted as a justice after he entered the army. Two others—A. H. Drewry and R. H. Watkins—entered the Confederate service in December, 1861, but they never went out of the county of Chesterfield; they were stationed at Drewry's Bluff, a few miles only from the court-house of the county, and both of them regularly attended the sessions of the county court. But the convention which sat at Richmond, November 23rd, 1861, (see Acts 1861-2, Ordinance No. 90), passed an ordinance expressly providing that no one holding an office under the State of Virginia, shall be deemed to vacate the same by entering the military service of the Confederate States. This ordinance, evidently, was intended to encourage enlistment, and Drewry and Watkins entered the service after its passage and under its provisions. So that, granting that Chalkley vacated his office by becoming postmaster; that Winfree was dead; and, that Clark, Vaden and Mason vacated their office by entering the Confederate service, and are not to be considered "acting justices"—this would be *five* from *twenty-four*, leaving nineteen—of which nine would not be a majority.

This case was tried in the county court, by a jury, upon an issue made up by petition and answer, which expressly denied the execution and delivery of the bond as the obligation of the county, and denied the alleged loan to the county of the money asserted as the consideration of the bond. There was a great mass of testimony—much of it conflicting, and much of it tending to show that the bond asserted never was executed and issued by the county of Chesterfield, and the money had never been loaned to the county; and that if so, it had been

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paid, as the county was always able to pay it. The bond is incomplete on its face: it is without date of execution, and without date of payment: there is no *registry of it*, as the order under which it is claimed to have been issued expressly required. It is claimed to have been issued June 9th, 1862, and was never presented by Wilkins Hall, who died in the fall of 1864; and his executor, L. L. Lester, kept it until 1878—a period of sixteen years, and never presented it for payment or said a word to any authority of the county about his having any such claim against the county; and never presented it for payment until after the death of the presiding justice, James H. Cox, during the war, and who attended to the whole business of purchasing the salt, and who was well known to know all about the bonds which had been issued by the county to pay for it, and which were required by the order of the court to be signed by him, and countersigned by the clerk, whose death, likewise, had taken place before this claim was exhibited to the light of day. The claim was a suspicious one, in all its aspects, and the jury was well warranted in finding their verdict for the county; and we think it was error in the circuit court to set aside the verdict which had been confirmed by the trial court.

There being no day of payment named in the bond, it is (as the appellee claims) payable on demand, with interest from June 9th, 1862: yet the order of June 9th, 1862, under which it is claimed it was issued, expressly provides that the bonds to be issued under its provisions, shall be made payable one year after date. This bond is, therefore, not a good execution of the power conferred by the order, was issued (if at all?) without authority; and no recovery can be had on it as a bond. Story on Agency, 63-73; *Dinwiddie County v. Stuart, Buchanan & Co.*, and *Pulaski County v. Same*; *supra*. *Batty v. Carswell*, 2 Johnson's L. Reports, p. 48: *Tate & Hopkins v. Evans*, 7th Missouri, 419. In *Batty v. Carswell*, *supra*, the authority was to execute a note for \$250, payable in six months; the agent gave the note payable in sixty days. The court held that the prin-

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cipal was not bound. But, even beyond this, as this bond given June 9th, 1862, imports a Confederate contract, it must be scaled as such, under the ruling in the *Dinwiddie* case; and the difference between scaling it as of June 9th, 1862, and twelve months after that date, is as *one and a half to eight*. This shows the essential necessity of the day of payment of the bond to have been made in conformity to the express requirement of the order of court that it should be payable one year after date. And, for this alone, the judgment of the circuit court is erroneous in scaling the bond as of the value of Confederate money June 9th, 1862.

But, for the reasons set forth at length, we are of opinion that the circuit court erred in disturbing the verdict of the jury and reversing the judgment of the county court, and that the judgment of the county court must be affirmed, and that of the circuit court reversed and annulled.

LACY, J., dissented.

JUDGMENT REVERSED.

Richmond.

MOORE v. STEELMAN.

MARCH 19TH, 1885.

1. EQUITY JURISDICTION AND RELIEF—*Remedy at Law*.—Where there are conflicting claims to personal property, possessing no *pretium affectionis*, the remedy is adequate at law, and equity will not take cognizance of the case, though one of the parties be a trustee, claiming the property under a trust deed. *Sheppards v. Turpin*, 3 Gratt. 357.
2. IDEM—*Injunction—Irreparable Injury*.—Where irreparable injury is imminent, against which there is no adequate protection at law and which is not compensable in damages, equity will take jurisdiction by injunction. The bill must set up the facts which exhibit the imminence and irreparableness of the injury.
3. IDEM—*Injunction—Dissolution*.—Where the answer denies all the grounds of equity set up in the bill, and those grounds are unsustained by proof, the injunction must necessarily be dissolved. *Hogan v. Duke*, 20 Gratt. 344.

Appeal from decree of circuit court of Chesterfield county, entered March 3rd, 1883, in the cause of J. S. Moore and J. M. Gregory, trustee, against Jeremiah Steelman and others.

In October, 1881, David E. Porter, by writing, sold to Steelman ten thousand cords of wood, to be cut in said county and delivered by a certain time on the Brighthope railroad, and there ricked for measurement and receipt, and to be paid for when so received. Steelman had advanced \$5,000 on the contract. Porter became embarrassed and unable to fulfill the contract, and about the last of June, 1882, by parol contract, sold all the wood he had cut and corded in the said county, and

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particularly on the Brander tract, to Steelman, in order to refund the \$5,000. But by trust deed, executed June 5th, 1882, but not recorded until August 2nd, 1882, the day after Porter died, the latter conveyed the Brander tract, and all the wood cut and corded on it, to Gregory, trustee, to secure a debt of \$1,500 to Moore. Steelman had no notice of this trust deed until after it was recorded; and had taken possession of the wood cut and corded on that tract, and was removing it to the railroad, when Moore and the trustee obtained an injunction. Steelman answered the bill, denying all the allegations whereon are based the alleged grounds of equity interposition, and the circuit court dissolved the injunction, and Moore and the trustee appealed.

J. M. Gregory, for the appellants.

B. H. Nash, for the appellees.

RICHARDSON, J., delivered the opinion of the court.

The real matter in controversy is in respect to the ownership of a large quantity of cord wood, cut and remaining on the tract of land in Chesterfield county, known as "Brander," and belonging to the estate of the late D. E. Porter, of said county.

The facts, briefly stated, are these: On the 14th day of October, 1881, David E. Porter and L. W. Cheatham, as partners, entered into a contract, under seal, with Jeremiah Steelman, of New York, to saw and deliver on the line of the Brighthope railway, not above Winterpock, to the said Steelman, *ten thousand or more* cords of first class pine wood, with certain specifications as to size and quality; the wood to be delivered ricked on the line of said railway by the 31st day of December, 1882; and when delivered, ricked as aforesaid, to be measured and received by Steelman or his authorized agent, as stipulated in the contract, and to be paid for as received and removed, at the rate

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of two dollars and fifty cents per cord, by drafts of said Steelman or his authorized agents, payable thirty days after sight. And the contract sets forth, that: "The party of the second part having made an advance of five thousand dollars on the above wood, it is agreed that the above advance shall constitute a lien on all the wood cut by the parties of the first part until said contract is filled." It was further stipulated, that all of said wood should be sawed before the 10th day of May, 1882. There are other stipulations contained in the contract which are not material to the question in hand, and need not be here referred to.

Under this contract (Cheatham having disclaimed any interest therein, and having been relieved therefrom,) Porter proceeded to cut and put in pens large quantities of wood on the tract of land owned by him, called "Brander," and on an adjacent tract, of which he was part owner, and on other tracts in said county where he purchased the privilege of cutting wood. It does not distinctly appear how much wood in all was cut by Porter under this contract, but the fair inference is, that as late as the last of June, 1882, the quantity was much less than the 10,000 cords stipulated for in the contract. At this period (the last of June, 1882,) Porter found himself financially embarrassed and unable to fulfill his contract with Steelman, so he approached Geo. E. Robertson, the duly authorized agent of Steelman in this and other wood contracts in that section, and admitting that he had no money, and could not deliver the wood according to his contract, but expressing the desire on his part to pay back to Steelman the \$5,000 advanced to him by the latter, proposed to sell to Steelman the wood cut on the Brander tract, saying at the time that the wood on the other tracts was encumbered, so that he could not sell and deliver it where it was in the forest, as he proposed to do in respect to that on the Brander tract. Thereupon, as agent, Robertson, at the request of Porter, purchased the wood on the Brander tract for his principal; the agreement being, that Steelman, or Robertson for

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him, should take possession of the wood as it was, on said Brander tract, haul it to said railway, ship and market it, and apply the net proceeds to the amount due from Porter to Steelman, it appearing that Porter had become indebted to Steelman in a sum considerably in excess of the \$5,000 advanced on said original contract. Under this new contract, Robertson, as agent for Steelman, was, by Porter, put in possession of said wood so situated, and at once commenced hauling and shipping, and openly continued to haul and ship said wood without objection or interruption from any source until after the death of Porter, which occurred on the 4th day of August, 1882, when he was enjoined and restrained from so doing until the further order of the circuit court of Chesterfield county.

This proceeding was had under these circumstances:

It seems that on the 5th day of June, 1882, D. E. Porter executed to James M. Gregory, trustee, a deed conveying, with other property, the said Brander tract of land, with all the wood then or thereafter to be cut on same, in trust, to secure to J. S. Moore, of Richmond, a debt of \$1,500, due by note of even date with said trust deed, and payable on demand. This trust deed was admitted to record in Chesterfield county, on the 5th day of August, 1882, the day after the death of Porter. Steelman denies any notice of the execution of this deed at the time of his purchase of the wood in question, and there is in the record nothing to show that he had any notice of its existence until the recordation thereof.

On the 2d day of December, 1882, said trustee, J. M. Gregory, and the beneficiary in said trust deed, J. S. Moore, presented to the Hon. Edw. H. Fitzhugh, judge of the chancery court of the city of Richmond, their bill, setting forth their case, and praying for an order to restrain the said Steelman and his agent, the said Robertson, and all other persons acting under their authority, or the authority of either of them, from removing, disposing of, or in any manner interfering with the cord wood on the Brander tract of land, or which has been carried

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therefrom to the Brighthope railroad since the 5th day of June, 1882.

The injunction was granted by Judge Fitzhugh, according to the prayer of the bill. From the answer of Steelman, in the record, it seems there was a previous injunction granted by the judge of the circuit court of Chesterfield, which on motion had been dissolved prior to the injunction awarded by Judge Fitzhugh. In their bill, the complainants set out said trust deed, and assert their right to the cord-wood on the Brander tract of land at the date of said trust deed, June 5, 1882, and allege the due appointment and qualification of Fannie L. Porter, as administratrix of said D. E. Porter, dec'd; that at the time of the execution of said trust deed, there was upon the said Brander tract of land about 3,000 cords of wood belonging to and in the possession of said D. E. Porter, and was part of the wood conveyed by said trust deed, and that there is no cord-wood on said tract other than what was conveyed by said trust deed; that the said trustee has been called upon to execute said trust, as required by the terms of the deed, and is informed, believes and charges, that Geo. E. Robertson, as agent of said Steelman, is removing said wood from said Brander tract, and shipping same to Steelman, in New York, contrary to the rights of complainants under said trust deed; and that complainants are informed that Steelman and his said agent are pretending that said Steelman purchased said cord-wood from D. E. Porter in his lifetime, and therefore owns the same. The bill further alleges, that the said Steelman acquired no title to or property in said wood, or any part thereof, by reason of said purchase, or any purchase made by him of said Porter during his lifetime, and that the title thereto is in the said trustee; that the cord-wood remaining on the Brander tract at the death of Porter, is far more than sufficient to pay off and discharge the claim of said Steelman; and that he has no right to disturb, remove or appropriate the entire lot of wood, or even any part thereof, until the rights and interests of complainants and said Steelman have been adjudi-

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cated by a court of equity; that it is not competent for the trustee to decide between contending parties and pass upon their rights in respect to the property in dispute, but that such is the proper prerogative of a court of equity; that the trustee cannot sell said cord-wood, as required by the trust deed, to proper advantage, while the said Steelman is claiming and removing same under color of said pretended purchase, by reason whereof they say, "the rights and interests conveyed and conferred by said trust deed, are being subjected to irreparable damage and injury." The bill does not allege that Steelman or his agent, Robertson, had notice of said trust deed at the time of the alleged purchase of the wood in question by Steelman, or at any time prior to the recordation thereof, but, speaking in the present tense, long after the recordation of the deed, uses this language: "Your orators further allege, that the said Jeremiah Steelman, and G. E. Robertson, his agent as aforesaid, *have* full and complete notice of the title of the trustee to the said cord-wood, and *having* such notice, they act in total disregard thereof." And further alleging that they are without remedy, save in a court of equity, the complainants pray that Fannie L. Porter, adm'x of D. E. Porter, dec'd, Jeremiah Steelman, and G. E. Robertson in his own right, and also as agent of said Steelman, be made parties defendant to their bill, and be required to answer the same on oath, as if interrogated in open court, to each and every allegation contained therein, and to show what title or interest, if any, they (doubtless meaning Steelman and Robertson) have to the said cord-wood, and when and how the same was acquired, and what consideration, if any, and to whom, how and when, was the same paid: and for the injunction awarded as aforesaid, and for general relief.

Robertson demurred to the bill, and disclaimed any interest in the subject of controversy.

Steeleman demurred to the bill, and answered the same promptly, and gave notice that he would move on a day named to dissolve the injunction.

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In his answer Steelman sets out substantially his original contract (before referred to) with Porter and Cheatham to deliver said large quantity of cord wood, a copy of which contract he files as an exhibit with his answer, and alleges, that for the cord wood to be cut and delivered under said contract, he advanced to Porter \$5,000; that said contract on its face appears to have been made with Porter and Cheatham, but that Porter was the real party interested, Cheatham disclaiming any connection with the contract, was released from it by respondent, with the consent and approbation of Porter; that Porter proceeded with the money advanced by the respondent to cut a quantity of cord wood, in several places in the county of Chesterfield, and especially on the farm owned by him, called the "Brander tract"; that said Porter had cut and corded on said tract about 2,300 cords of pine wood; that in the latter part of June, 1882, said Porter, finding himself unable to haul the wood he had contracted to deliver, and desirous of paying back the said \$5,000 advanced him by respondent, proposed to respondent, through his duly constituted agent, Geo. E. Robertson, that respondent should take the wood then cut and corded on the Brander tract, haul, transport and ship the same to New York, and sell the same, and apply the proceeds to the payment of the said sum of \$5,000, as far as it would go in payment thereof; that respondent accepted the proposition, and did then and there, in the lifetime of said Porter, take possession of said cord wood, and was in full possession of same (as completely as one could take possession of such a bulky article as cord wood), and was hauling and shipping the same during the lifetime of said Porter and after his death, until arrested therein by an injunction, which was subsequently, to wit, on the 11th day of November, 1882, dissolved by the Hon. S. S. Weisiger, judge of the circuit court of Chesterfield; that since that time, respondent has again been hauling and shipping said wood, until stopped by the injunction order granted by the Hon. E. H. Fitzhugh, on the 2nd of December, 1882; and that

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respondent was put in possession of said cord wood by D. E. Porter in his lifetime, and that his possession of and right of property therein was never questioned or disputed until after Porter's death.

Respondent, in his answer, then calls attention to the fact that said deed of trust, which bears date June the 5th, 1882, was not recorded until the 5th day of August, 1882, the day after the death of said Porter, the grantor. And in response to the bill, the respondent denies that he or his said agent had any knowledge of said deed of trust, or of any claim on said wood by J. S. Moore, or by said trustee, Gregory, or any one else, until the 5th day of August, 1882, when for the first time the deed was admitted to record; says it is true, as alleged in the complainants' bill, that his agent, Robertson, was removing and shipping said wood to respondent in New-York, but insists upon his ownership of the wood, and his right to ship and market it; denies the statement in the bill that he has no title and right to said wood; denies also the statement that the cord wood remaining on the Brander tract at the death of said Porter is more than enough to pay off his claim on the amount advanced to Porter, and says the amount of wood so remaining on said tract was about 1900 or 2000 cords, which, in the woods, was worth about \$1.65 per cord, which would make a sum far less than \$5,000; and, directly in response to the bill, shows how he acquired title to the wood, and how the same was paid for, by filing with his answer five drafts drawn on respondent by Porter and Cheatham, and paid by respondent in accordance with the provisions of said contract of the 14th day of October, 1881. In short, the answer separately and in detail denies in the most direct and emphatic terms, each and every allegation in the bill touching respondent Steelman's right to said wood; and respondent insists that a court of equity cannot undertake, in a case like this, to pass upon the rights of property between conflicting claimants, which is peculiarly the province of a court of law.

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According to notice, the motion to dissolve the injunction came on and was heard, in vacation, on the 3rd day of March, 1883, on the complainant's bill and the demurrer thereto of Geo. E. Robertson and joinder therein, the answer of Jeremiah Steelman and exhibits filed therewith, and the affidavit of Geo. E. Robertson, filed by the defendant Steelman in support of his motion to dissolve, when the judge of the circuit court of Chesterfield sustained the demurrer of Geo. E. Robertson and dismissed the bill as to him; and for reasons appearing to the court, it was adjudged, ordered and decreed, that the injunction theretofore awarded in this cause, on the 2nd day of December, 1882, be dissolved, and that said Jeremiah Steelman recover of the said plaintiffs his costs, &c. From that decree, dissolving said injunction, the case is here on appeal.

I. It is clear that a court of equity has no jurisdiction of the case as made by the bill. Personal property, a lot of cord wood, as to which there are conflicting claimants, is the subject of controversy. For the settlement of such a question a court of law is the peculiarly appropriate tribunal. The plaintiffs claim the subject of controversy under a trust deed executed by Porter in his lifetime, but not recorded until after his death; and in the bill it is stated that the defendant, Steelman, claims the same subject under a purchase by him from Porter during his lifetime; and the bill, though styling Steelman's claim a pretended one, does not charge that Steelman had notice of the unrecorded trust deed at the time of his alleged purchase, or at any time during Porter's life, and prior to the recordation of said trust deed. There is thus presented by the bill, a case of conflicting claims to personal property, as to which the remedy at law is complete.

In 1 Barton's Chy. Pr. 430, it is said, "As the general jurisdiction of courts of chancery is founded in a lack of remedy in the courts of law, so especially is relief given by means of injunctions, because there is none, or no adequate remedy at law, and because compensation by way of damages will not be suffi-

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cient to restore the party to his rights, or to replace the wrong that may be done to him. It will be found upon careful investigation, that all the grounds upon which the right to an injunction rests, are traceable to this general rule of preventing irreparable wrong or mischief." See also Minor's Inst., vol. 4, pt. 1, p. 7, 109, 133, 473; Story's Eq. Juris. § 921, *et seq.*; *Irvine v. Dixon*, 9 How. 10; *Bouryer v. Creigh*, 3 Rand. 32; *Coulter v. Hunter*, 4 Rand. 58; Adams' Eq. 210.

The bill in this case, in a general way, alleges, among other things, that Steelman's actings and doings in respect to the subject of litigation will result in irreparable damage and injury to the plaintiffs. This is not enough. There must be something peculiar in the case, so as to bring the injunction under the head of quieting possession or preventing irreparable mischief. *Livingston v. Livingston*, 6 Johns. Chy. R. 497. The bill here makes no such case. Moreover, the facts which show the irreparable nature of the injury must be set out in the bill, a mere general averment is not sufficient. *Chesapeake & Ohio Co. v. Young*, 3 Md. 480. The injury complained of must be such that it is not susceptible of compensation in damages at law. *Jerome v. Ross*, 7 Johns. Chy. R. 315; *Harley v. Cloves*, 2 Johns. Chy. 122. Here, unquestionably, a case is stated by the bill, in respect to which there is no obstruction to the remedy at law, which is ample. 'Indeed, nothing to the contrary is suggested; and it would seem that the bill itself is a sufficient refutation of the claim to equitable jurisdiction relied on in the argument.

II. It necessarily follows that the injunction was properly dissolved. The settled doctrine is, that where a motion to dissolve is on the bill and answer, and the answer denies all the equity of the bill, the injunction is dissolved, of course, except when from the bill and answer, special reasons may appear for continuance. 1 Barton's Chy. Pr. 414; *Hoffman v. Livingston*, 1 Johns. Chy. R. 211; *Minton v. Seymore*, 4 Johns. Chy. R. 497; *Hayzlitt v. McWilliam*, 11 West Va. 464; *Deloney v. Hut-*

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cheson, 2 Rand. 183; *North's Ex'r v. Perron*, 4 Rand. 1; *Hogan v. Duke*, 20 Gratt. 244.

Here, the answer of Steelman, in the most explicit and direct terms, denies each and every material allegation in the bill, and the plaintiffs utterly fail to sustain their bill by any relevant auxiliary evidence. Under the well settled law, no course was left open to the court but to dissolve the injunction. On the other hand, on the motion to dissolve, Steelman introduced the affidavit of Geo. E. Robertson, which, to the fullest extent, sustains said answer. This affidavit is for the first time objected to here, on the ground that the affiant was the agent of Steelman, and made the purchase of the wood relied on by Steelman, and that he was thus a party to the *transaction*, and not competent to testify, Porter, the other party, being dead. It is obviously unnecessary to decide this question, as, independent of this affidavit, the injunction was properly dissolved.

In any and every view of the case, we are of opinion that the decree appealed from is plainly right and must be affirmed, with costs to the appellee Steelman.

DECREE AFFIRMED.

Richmond.

KAHN v. KERNGOOD.

MARCH 19th, 1885.

(Absent, *Lewis P.*)

1. APPELLATE JURISDICTION—*Dissolution of Injunctions*.—From an order overruling an injunction and adjudicating the principles of the cause, an appeal lies. Code 1873, ch. 178, sec. 2.
2. IDEM—*Matter in Controversy*.—Where a deed conveys property alleged therein to be worth over \$500, and is assailed as fraudulent by a creditor whose debt is less than \$500, as between the grantee and the assailing creditor, the matter in controversy is the value of the property, and not the amount of the debt; and in the absence of proof to the contrary, the alleged must be deemed the actual value of the property.
3. PRACTICE IN CHANCERY—*Injunctions*.—When on bill and answer denying all equity in the bill, there is a motion to dissolve an injunction, it is customary to dissolve; but for good cause the motion may be overruled, and the injunction continued till the hearing without any adjudication of the principles of the cause.

Appeal of B. Kahn from two decrees of the judge of the corporation court of the city of Norfolk, entered in vacation on the 27th April, 1883, and on the 2nd May, 1883, respectively, in a certain suit, wherein said Kahn and another are defendants, and Tobe Kerngood, Wm. Kerngood and Abe Kerngood, partners in the name of Kerngood & Bros., are plaintiffs. The object of the suit is to set aside as fraudulent a certain deed executed by one J. D. Hofheimer, who is the debtor of the plaintiffs to the amount of two notes aggregating, after deducting a credit of \$100, about \$203, to B. Kahn, and convey-

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ing to him goods, wares and merchandise, alleged in the deed to be of the value of about \$1500. An injunction was awarded restraining the sale of the property, and an order entered directing the sale of the property at auction. Kahn answered the bill, denying all the allegations of fraud on the part of himself or of his grantor: and on the bill and the answer, and on the affidavits, moved the dissolution of the injunction. The motion was overruled, and Kahn appealed to this court.

Borland & Brooke, for the appellant.

Godwin & Martin, for the appellees.

HINTON, J., delivered the opinion of the court.

The plaintiffs, who constitute the firm of Kerngood Bros., in their bill allege that they are creditors of one J. D. Hofheimer, who had recently sold his stock of goods and personal property to one B. Kahn, with intent to defraud the creditors of the said Hofheimer; that Kahn had conspired with Hofheimer in his attempt to carry out this fraudulent purpose; and they pray that Kahn and Hofheimer may be enjoined from disposing of said property; that a receiver may be appointed; the conveyance be declared void; and the property may be sold under the direction of the court. This bill was filed in the clerk's office of the corporation court of the city of Norfolk, on the 27th day of April, 1883, in vacation; and on the same day an injunction was awarded; a receiver appointed, and a sale of the property was directed by the judge of that court, in accordance with the prayer of the bill. On the next day Kahn filed his answer, in which he specifically denies every allegation of fraud in the bill positively, so far as he was concerned, and to the best of his information and belief, so far as his vendor, Hofheimer, was concerned. On the 29th April, 1883, the receiver advertised the property for sale, at auction, on the 4th May then next en-

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suing. On April 30th, 1883, Kahn served notice of a motion to be made on May 2nd, 1883, to dissolve the injunction on the bill and answer. On the last mentioned day, the cause came on to be heard, pursuant to said notice, upon the bill and answer, and three affidavits in support of the bill, when the judge overruled the motion to dissolve the injunction, and continued the same to the hearing. Whereupon, the said Kahn applied for and obtained an appeal from one of the judges of this court.

The first question, therefore, which arises is as to the power of this court to take cognizance of the case. It is insisted that this being a mere order refusing to dissolve an injunction, that no appeal lies therefrom. Such, however, is not the case. The Code 1873, chap. 178, § 2, provides that "any * party to a case in chancery wherein there is a decree or order dissolving an injunction, or requiring money to be paid, or the possession or title of property to be changed, or adjudicating the principles of the cause, * * * * may present a petition for an appeal from the decree or order," &c. And Judge Moncure, in the case of the *Baltimore and Ohio R. R. Co. v. City of Wheeling*, 13 Gratt. 57, said, "As to the objection that no appeal lies from the other order; it being a mere refusal of the judge in vacation to dissolve the injunction, and not an order adjudicating the principles of the cause. There seems to be no substantial difference between the provision on this subject in the Code, p. 682, ch. 182, § 2, and the law as it existed when the Code took effect. In *Lomax v. Picot*, 2 Rand. 247, it was decided that an order overruling a motion to dissolve an injunction might come within the terms of the law allowing appeals from interlocutory orders, and within the mischief intended to be remedied by that law. The appeal in that case was from such an order, and the court entertained jurisdiction of it. In *Talley v. Tyree*, 2 Rob. R. 500, it was held, in accordance with *Lomax v. Picot*, that an appeal lies to this court from an order of the circuit court overruling a motion to dissolve an injunction which was improvidently granted. The law under which those two cases were decided

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being the same in effect with the provision on the subject in the Code, they maintain the right of appeal from the order in this case." And again he says, at page 59: "The refusal of the judge to dissolve the injunction adjudicated the principles to this extent, that the injunction had not been improvidently awarded, and that as the cause then stood it ought still to be continued. It is therefore such an order as may be appealed from."

Upon this point we think the statute and case above quoted must be regarded as conclusive. The appeal in the case before us was taken as well from the order appointing a receiver and directing a sale, as from that refusing to dissolve the injunction; and as it cannot be contended with any show of success that the stock of goods described in this case is of the character of those spoken of in section 16 of chapter 148, Code 1873, which the court is authorized to sell because "perishable and expensive to keep," we must assume that the court regarded and treated them as the property of Hofheimer, for upon no other ground could the judge have the slightest pretext for selling this property; and this was a practical adjudication of the matter in issue, namely, the title to the property; and even then, his action must be regarded as irregular and premature.

But it is contended, that the amount of the plaintiff's claim being under \$500, that this court cannot take jurisdiction of the case. This contention is founded, in our judgment, upon an entire misapprehension of the real matter of controversy. This is a suit to set aside a conveyance alleged to be fraudulent as to creditors. The value of the property, stated in the deed, is \$1500, and upon this appeal, in the absence of proof of its real value being less, we must assume that amount as its value, and it is therefore sufficient to give jurisdiction. As between the plaintiffs and the defendant Kahn, there is no contest over a debt. It is admitted, that no matter what may be the debt due from Hofheimer to the plaintiffs, that Kahn does not owe them one cent. Nor is it pretended that Kahn's property, if it be

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Kahn's, is bound by any lien of the plaintiffs. It is only in the event that the deed is proven to be fraudulent in its entirety that the plaintiffs can have any possible claim upon the property conveyed thereby. It is therefore not a contest, so far as Kahn is concerned, over a debt, or even over property, of less value than \$500, but it is as to him, a contest as to his title to \$1500 worth of property. The suit not having been brought to set aside the deed in part but in whole, the real question, so far as Kahn is concerned, is whether the \$1500 worth of property conveyed by that deed is his or Hofheimer's, and the question as to the amount of the plaintiffs' debt is one collateral to the main issue.

And this brings us to the last question in the case, which is, whether the court should have dissolved the injunction on bill and answer or not? The general rule is, that when a motion to dissolve comes on to be heard upon the bill and answer, and the answer denies all the equity of the bill, the injunction is usually dissolved; but this rule is not inflexible, for the court may, for good cause shown, refuse to dissolve the injunction, and continue it to the hearing, without adjudicating the principles of the cause. Sands' Suit in Equity (new edition), § 366; 1 Barton's Ch'y Pr. 467; *B. & O. R. R. Co. v. City of Wheeling*, 13 Gratt. 58. We think the case at bar falls within the exception. The law of this state being settled since the case of *Davis v. Turner*, 4 Gratt. 423, that the retention of the possession of personal property by the vendor, after an absolute sale, is *prima facie* evidence of fraud as against the creditors of the vendor, which will vacate the transaction as to them, unless the vendee shall prove it to be fair and *bona fide*. We think it was proper for the judge to have refused to dissolve the injunction upon the mere answer of only one of the parties to the assignment.

We are of opinion, therefore, to reverse the order of the judge of the corporation court of the city of Norfolk, made in vacation on the 27th day of April, 1883, in so far as it directs a sale

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of the property in the bill and proceedings mentioned, and to direct that the said property be returned to the custody of the appellant Kahn, upon his executing and delivering a sufficient bond to secure the forthcoming of the property, to answer the future orders of the court, to discharge the receiver, and to remand the cause for further proceedings to be had in order to a final decree.

RICHARDSON, J., dissenting, said:

I cannot concur in the opinion of the majority of the court just pronounced, without in my opinion overstepping the jurisdictional limits of this court as plainly prescribed by the constitution.

That the case is one of unusual hardship upon the appellant cannot be denied. In fact, it is so clearly a case of the wrongful exercise of the discretionary powers of the court below, that, but for the inhibition imposed by the constitution, I would not hesitate to break away from any mere line of precedents sanctioning such manifestly erroneous and oppressive practice as that disclosed by the record in this case.

Notwithstanding all this, I cannot be unmindful of the fact that the constitution, as I understand it, in most positive and unequivocal language actually prohibits this court from taking jurisdiction of the case. Section 2, of article 6, of the constitution of Virginia, declares that this court shall have appellate jurisdiction only, except in cases of *habeas corpus*, *mandamus* and prohibition; and expressly provides, "It shall not have jurisdiction in civil cases where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars," with certain enumerated exceptions.

That this case does not come within any of the exceptions mentioned in said 2nd section will be conceded by every one. That it is a *civil* case in the sense in which that term is employed in said section, no one will deny.

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That the true and only test of what is meant by "the matter in controversy," as used in said section, is the amount mentioned in the declaration or bill, and sought to be recovered by the plaintiff, has been too long and well settled by numerous decisions of this court, and too universally acquiesced in by bench and bar to be now disturbed by anything short of an authoritative change in the constitution itself; a change which this court is without authority to make. The majority opinion proceeds upon the idea that this was not a suit pure and simple, for the collection of the plaintiff's claim, which is confessedly far below the jurisdictional limit of this court, but is a suit to set aside the conveyance or sale of goods made by the debtor, Hofheimer, to the appellant, Kahn, which goods, it is said, are of the value of \$1500. It would seem to be obvious that jurisdiction cannot be conferred upon this court by any such means. This is apparent when we reflect that the plaintiffs below, the appellees here, had for their prime object the collection of their debt, less far than \$500, to do which, by reason of the alleged fraudulent combination between their debtor, Hofheimer, and the appellant, Kahn, it became necessary to resort to equity, when otherwise they would necessarily have been left to their remedy at law. Hence, the bill charges that the transaction was not a *bona fide* sale by Hofheimer to Kahn, but a fraudulent combination between them to avoid the payment of the debt to the plaintiffs, from Hofheimer. Under this charge of fraudulent confederation, Kahn, it is true, answers the bill, denies all fraud on his part, or any knowledge of fraud on the part of his alleged confederate, and moves to dissolve the injunction. In this way, only, does the idea come into the case that the stock of goods in question is of greater value or amount than five hundred dollars. It must be borne in mind that the court below in granting the injunction, putting the goods in the hands of a receiver, and directing the goods to be sold, and the receiver to report to court, did not pass upon the merits, not even to the extent of holding that

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the plaintiffs have a valid claim; all that is matter for consideration when the proofs are in, the case matured, and a final hearing shall be had. If, at the final hearing it shall turn out that the alleged fraudulent transaction was in fact a *bona fide* purchase by Kahn, for any damage he may have suffered, the injunction bond will be his indemnity.

It seems, therefore, manifest that, in taking jurisdiction upon the basis of value fixed by Kahn's answer (especially under the circumstances of this case), is for this court, upon an appeal from a mere interlocutory order refusing to dissolve an injunction, to assume in advance of the maturing and hearing of the case upon the merits in the court below, that Kahn's answer is true, and the case, in effect, at an end. Such surely cannot be safe or sound judicial procedure. But however true Kahn's answer may be, jurisdiction cannot be founded thereon, or on anything therein contained, as that answer in no possible way constitutes or discloses the real matter in controversy; but is in respect only to a mere incident to the matter really in controversy.

But it is moreover strenuously contended that the order or decree appealed from here, changes the possession and title of property, and that therefore this court has jurisdiction under section 2 of chapter 178, Code 1873. This section must be read in connection with the succeeding third section, and subject to the constitutional provision aforesaid; in fact, the two sections are in effect but one, the third being in the nature of a proviso to the second, the two being only separated by a colon. The two together read:

“2d. Any person who thinks himself aggrieved by an order in a controversy concerning the probate of a will, or the appointment or qualification of a personal representative, guardian, curator or committee, or concerning a mill, road-way, ferry or landing; or any person who is a party to any case in chancery wherein there is a decree or order dissolving an injunc-

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tion, or requiring money to be paid, or requiring the possession or title of property to be changed, or adjudicating the principles of a cause, or to any civil case wherein there is a final judgment, decree or order, may present a petition, if the case be in chancery, for an appeal from the decree or order; and if not in chancery, for a writ of error or supersedeas to the judgment or order, *except as follows*:

“3d. No petition shall be presented for an appeal from, or writ of error or supersedeas to, any final judgment, decree or order, whether the commonwealth be a party or not, which shall have been rendered more than two years before the petition is presented; nor to any judgment of a county or corporation court, which is rendered on an appeal from a judgment of a justice; nor to a judgment, decree or order of any other court, when the controversy is for a matter less in value or amount than five hundred dollars, exclusive of costs, unless there be drawn in question a freehold or franchise, or the title or bounds of land, or some matter not merely pecuniary.”

The remainder of the third section is unimportant here.

These two sections, by strict grammatical arrangement, of obvious meaning, are purposely linked together, are on the same subject, the one qualifying and explaining the other, and must be read and construed, with reference to each other, in the light of the constitutional provision aforesaid, prescribing the jurisdictional limit of this court. When so read, all idea of this court's jurisdiction, in this case, is actually precluded.

The legislature, in regulating the subjects of appeal and writs of error, by the said second section, enumerates, out of abundant caution, certain exceptional cases, such as the probate of a will, the appointment or qualification of a personal representative, and mills, roadways, ferries, &c.; in respect to all which the right of appeal is secured by express provision of the constitution. Then follows a further enumeration, in the same section, of other cases not enumerated in the constitution, it is

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true, but as to which the right of appeal is given, subject, of course, to the express constitutional limitation in respect to "*value or amount*," such, for instance, as where in a chancery cause there is a decree or order dissolving an injunction, or requiring money to be paid, or *the possession or title of property to be changed*, &c. As to all these cases, mentioned in the second section, the legislature only provided the mode of procedure in going from the trial to the appellate court, and conferred, in certain cases, the right of appeal from interlocutory decrees or orders, thereby saving time, anxiety and expense to litigants. But seeing that, by a literal construction of the second section, it was liable to be held unconstitutional, the legislature, instead of stopping short, concludes the section with the pointedly significant words, "*except as follows*." And then follows the third section, declaring in what cases (among other things) there shall be no appeal to this court; and among them, where the "*controversy is for a matter less in value or amount than five hundred dollars, exclusive of costs*." Thus squaring up to the constitutional requirement, and in effect saying, that notwithstanding what is said in the second section as to the right of appeal from a decree dissolving an injunction, or directing money to be paid, or by which the possession or title of property is changed, the real meaning is, that those provisions are subject to the constitutional provision forbidding the appeal, where the matter in controversy is less in value or amount than five hundred dollars. This suit was never brought for any purpose other than the collection of the plaintiff's claim. The alleged fraudulent collusion between the debtor and the appellant is simply an incident; and hence, the sole object of the suit being to collect the plaintiffs' debt, they come invoking the aid of a court of equity, to do what? Simply to remove from their path certain fraudulent obstructions, that they may collect their debt, the real matter at issue, and for the accomplishment of which object only was the suit brought.

It will be observed that said third section of chapter 178,

after modifying and expressly restricting the right of appeal, in certain cases mentioned in the preceding second section, to the pecuniary amount prescribed, as aforesaid, by the constitution, and after, in express terms, declaring that in no case, (*i. e.* no case in which the right of appeal as mentioned in said 2nd section, and not secured by the constitution) shall an appeal be allowed where the controversy is for a matter less in value or amount than five hundred dollars, exclusive of costs, adds, "unless there be drawn in question a freehold or franchise, or the title or bounds of land, or some matter not merely pecuniary." Here we find still another enumeration of cases in which the right of appeal to this court is secured, as to one of which, (that concerning the title or bounds of land), the right is secured by the constitution: the other two—the one in respect to a freehold or franchise, and the other as to matter not merely pecuniary—not being in the enumerated exceptions contained in the said provision of the constitution, but expressly provided by the legislature, because thought to be essential to the ends of justice, and because not within the constitutional inhibition, which addresses itself exclusively to the pecuniary value or amount in controversy. Therefore, these exceptions created by the latter clause of said 3rd section, are valid.

No one will pretend that there is involved in this suit any question of freehold or franchise, or any question concerning the title or bounds of land; nor can it be said with the least degree of plausibility that there is drawn in question, in this suit, any matter not merely pecuniary: the object of the suit being purely one for the recovery of a pecuniary demand, and it being obvious that in no event can the stock of goods in question (a mere incident to this suit) be affected, except to the extent of the debt sued for. If it could be otherwise, then this court would be absolutely overrun with petty litigation in respect to almost numberless cases where the matter in controversy would range between twenty dollars and five hundred dollars, and where, however small the claim between the limits

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named, the debtor would have the right of appeal to this court upon the absurd idea that, while the debt sued for is barely over twenty dollars, the plaintiff invoking the aid of a court of equity to the end that he may collect his debt by the avoidance of a fraudulent conveyance or sale of property of greater value than five hundred dollars, thereby secures to the alleged fraudulent defendant the right of appeal. Such a construction would not only be a palpable violation of the clause of the constitution regulating the appellate jurisdiction of this court, but would be, in effect, a premium to fraud.

By the use of the language securing the right of appeal as to matters "not merely pecuniary," the legislature never intended to flood this court with vexatious petty litigation; but obviously intended to provide for a meritorious class, as, for example, where the controversy is as to the possession of deeds and other muniments of title, when, irrespective of value (as in the case respecting the title or bounds of land), justice and sound policy demand that the right of appeal should be allowed. But it is useless to pursue this branch of the subject further, except to say that, from whatever standpoint the subject be viewed, there be absolutely nothing to sustain the idea that the stock of goods, as to which the fraudulent collusion is alleged, can afford the test of jurisdictional amount or value.

"Matter in controversy," means the essence of the issue, the thing or value, or amount of the thing for the recovery of which the suit is brought. This subject is exhaustively discussed by Christian, J., in *Umbarger v. Watts*, 25 Gratt. 167, where the general view here contended for is clearly and ably held.

It only remains to say, this suit was not brought to recover the stock of goods in question, or the value thereof, but only to recover the plaintiffs' debt, and as an incident, equitable aid is invoked, which in no manner involves the value of said goods, but simply seeks to subject the same, or so much thereof as may be necessary, to satisfy the claim. In no event can the

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decree of the court below be for any other or greater sum than the debt sued for, with interest and costs. The essence and substance of the suit is the debt sought to be recovered; and by the payment of that, the defendants, or rather the debtor, may discharge himself. In every case the decree is for the payment of the money found due, and if not paid in a reasonable time, as prescribed, the property subject thereto, or so much as may be necessary, is sold. To illustrate the correctness and even necessity for the construction here contended for, take the ordinary case of a suit in equity to enforce the lien of a judgment. Would it not be unreasonable to hold, that in such case, although the judgment and interest at the date of the decree was less than \$500, yet, it appearing that the land decreed to be sold is worth something over \$500, the judgment debtor would therefore be entitled to an appeal to this court? It is certain that in such case he could not appeal, however many and gross errors may have been committed by the court below. On the other hand, take the case of a creditor whose judgment is largely in excess of \$500, and the property sought to be subjected happens to be of less value than \$500, can it be held, in case of a decree wholly disallowing the plaintiffs' claim, that he cannot appeal? In other words, that because the defendant's property liable to his debts will not pay all, the plaintiff shall not have satisfaction to the extent of the value of the property liable. Yet these strange results must necessarily follow if the opinion of the majority of this court is to become settled law.

I would willingly, even gladly, give the relief sought by this appeal, if I did not feel myself actually prohibited therefrom by a positive constitutional command. For the reasons above, I am clearly of opinion that this court has no jurisdiction of the case, and that the appeal was improvidently allowed, and should be dismissed.

DECREE REVERSED IN PART.

Richmond.

GREGORY v. PEOPLES.

MARCH 19th, 1885.

1. **WARRANTY OF TITLE—*Estoppel*.**—Where one conveys land with general warranty, whereof at the time he has not the title, but afterwards acquires it, such acquisition enures to the grantee. *Raines v. Walker*, 77 Va. 92. The warrantor is estopped from denying he had the title.
2. **IDEM—*Bankruptcy—Estoppel*.**—A discharge in bankruptcy releases the warrantor from liability for covenants broken, but does not affect the estoppel, because the covenant runs with the land. *Bush v. Person*, 18 Howard, 82.
3. **IDEM—*Idem—Resulting trust*.**—Where one having only the equitable title, conveys the land with general warranty; then is discharged in bankruptcy; and afterwards, *with another's money*, buys the land, at a resale thereof for the unpaid purchase money, and obtains to himself a conveyance thereof, such title *does not* enure to his grantee, and he is *not estopped* to deny he had the title, because a trust resulted in favor of him whose money bought the land.
4. **FRAUD—*Purchaser for value without notice*.**—On doubtful evidence fraud must not be assumed. It must be distinctly alleged in the bill, and clearly proved. And so, of the defence of purchaser for value without notice.

Appeal from decree of circuit court of Mecklenburg county, entered May 29th, 1882, in suit of Robert H. Gregory against J. M. Sloan, sheriff, and administrator of Lewis J. Peoples, deceased, John R. Haskins and N. M. Norwood. In 1863, Haskins conveyed with general warranty land in said county to Peoples. He had not then the legal title. A part of the purchase money due from him was unpaid, and the title was withheld. In 1869, a suit was brought to collect the same, and the land was resold

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therefor. With Norwood's money, Haskins purchased the land at the resale, and the title was conveyed to him in 1870. But, in 1868, he had received his discharge in bankruptcy. Peoples occupied the land from the date of his purchase in 1863, till his death in 1879. Shortly before his death, he sold and conveyed it to Gregory, subject to certain judgments against Peoples in his lifetime. In 1880, Gregory filed his bill praying that his title might be cleared and quieted. He claimed that the legal title obtained by Haskins in 1870, enured to Peoples, and through him to his grantee; and that Haskins' warranty estopped him from denying he had the title. In March, 1880, the circuit court so decreed. Afterwards, Haskins and Norwood, who were non-residents, appeared and defended the suit. They set up Haskins' bankruptcy, and insisted that its effect was to release Haskins of the warranty, and that consequently his subsequent acquisition of the title did not enure to Peoples, and that a trust resulted in favor of Norwood, whose money had bought the land. In reply, Gregory contended that taking the deed in Haskins' name, was intended as a fraud on Norwood's creditors, and that no trust could result from a fraud. But there was no sufficient proof to establish any fraud, or that Norwood owed any debts. By its decree of May, 1882, the circuit court reversed the decree of March, 1880, and sustained both defences. From this decree Gregory appealed to this court.

Finch & Atkins, for the appellant.

R. T. Thorp, for the appellee.

LEWIS P., delivered the opinion of the court.

In respect to the first ground of defence relied on in the court below, little need be said. It was claimed that by his discharge in bankruptcy Haskins was released from the obligation of his

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covenant to warrant the title to the land conveyed by him, and that consequently the subsequent conveyance of the legal title to him did not enure to the benefit of his grantee. This contention would be well-founded if the case of the appellant rested solely on the personal liability of Haskins, growing out of his covenant. But it does not. Such a covenant is not only one running with the land, for the breach of which the covenantor is liable in an action for damages, but is something more. By its operation a paramount title, subsequently acquired by him enures to the benefit of the covenantee, and in equity he is estopped from asserting that any outstanding title existed inconsistent with what he undertook to convey. It has therefore been held that a discharge in bankruptcy, while effectual to release the covenantor from liability in an action for a breach of the covenant, does not at all affect the estoppel. This is on the ground that, as the release is by force of the statute, and not by the act of the covenantee, or those claiming under him, no greater effect will be given to it than is warranted by the terms of the statute; and for the further reason that existing personal liability is not necessary to work an estoppel, and consequently there is no necessary connection between the personal liability of the debtor on his covenant and the estoppel which arises therefrom. Such was the decision of the supreme court of the United States, in a case arising under the bankrupt act of 1841. *Bush v. Person*, 18 How. 82. And what is there said as to the effect of a discharge under the act of 1841, equally applies to the act of 1867, under which the defendant, Haskins, was discharged.

Upon the second ground, however, the defence is fully sustained. It is true, as we have seen, that where land in which the grantor has only an equitable estate is conveyed by deed with general warranty, the subsequent acquisition of the legal title by the grantor enures to the benefit of the grantee and those claiming under him. *Doswell v. Buchanan's ex'or*, 3 Leigh, 365; *Burtner v. Keran*, 24 Gratt. 42; *Raines v. Walker*,

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77 Va. 92. But in the present case the evidence is conclusive, and indeed, uncontradicted, that the purchase money for the land was wholly advanced by Norwood, and that in purchasing at the re-sale in 1869, Haskins acted as Norwood's agent, though the deed was made to Haskins. Under these circumstances a trust resulted in Norwood's favor, and consequently in equity Haskins must be regarded as holding the legal title as a mere trustee for Norwood. 2 Minor's Insts. 191; *Bank of the U. S. v. Carrington*, 7 Leigh, 566; *Kane v. O'Connors*, 78 Va. 76, and cases cited. No title, therefore, was acquired by Haskins upon which any estoppel growing out of his deed to Peoples can operate in the appellant's favor.

It is insisted, however, that Norwood's object in causing the deed to be made to Haskins, was to cover up his estate to defraud his creditors, and that no trust can result from a fraud. To the first branch of this proposition several answers are furnished by the record. In the first place, the evidence relied on to establish fraud is vague and unsatisfactory. It consists solely of the appellant's own deposition, in which he testifies to certain admissions which he says were made to him by Norwood and Haskins, to the effect that the deed was taken in the latter's name, because the former, who was a tobacco manufacturer, was at the time, "in some trouble with the revenue department, and that he did not want to have the deed made to himself until that was settled." It does not appear, however, what the "trouble" was, or that Norwood was indebted, or that any pecuniary demand had then, or has since, been asserted against him by any one. Haskins testifies that Norwood being liable as his surety on the bonds for the deferred payments, executed by him at the time of the first sale, requested him to attend the second sale and "make the land bring the debt," which he did, and that the deed was taken in his name because he transacted all the business. "That," he says, "was the reason, and the only reason that I know."

It is obvious that this testimony falls short of establishing the

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fraud upon which the appellant relies. "Fraud," said the court in *Hord's adm'r v. Colbert*, 28 Gratt. 49, "is not to be assumed on doubtful evidence, or circumstances of mere suspicion. The party alleging the fraud must clearly and distinctly prove it. * * If the fraud is not clearly proved as it is alleged, although the party against whom relief is sought may not have been perfectly clear in his dealings, no relief can be had."

Moreover, it appears that Peoples, the appellant's grantor, had notice of the re-sale in 1869, and that he subsequently, and before his conveyance to the appellant, who was his step-son, acknowledged Norwood's title by becoming his tenant. This is averred in Norwood's answer, and the averment is sustained by the proof. Thus, in a letter written by him to Norwood, dated August 24, 1876, he says: "I will take the land here another year on the same terms as this year. * * I will give \$150 for your interest in the land for next year." This letter purports to have been written from the writer's post-office, which was on the North Carolina side of the state line; and from this fact it is argued by counsel for appellant that the land here referred to was a tract of land owned by Norwood, in the same neighborhood, and lying in North Carolina. But this idea is repelled by the circumstance, that the writer was at the time living on the land in controversy, and also by the amount of the rent offered. The sum offered was \$150, and the evidence shows, or strongly tends to show, that the annual rental value of the North Carolina land did not exceed the sum of \$75. In addition to this is the testimony of the witness, W. A. Quincy, who testifies, that after the sale in 1869, Peoples advised him to buy of Norwood the land in controversy.

But independently of the evidence, the question of fraud may be laid out of the case, inasmuch as no such issue is properly raised by the pleadings. Fraud, since it must be clearly proved, must be distinctly alleged; and here no such charge is to be found in the bill. The only way in which it was sought to be

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raised was by *the replications to the pleas of bankruptcy*. If intended to be relied on by the plaintiff, it should have been charged in the bill, and an opportunity thereby afforded the defendants to meet it in their answers. Kerr on Fraud and Mistake, 365. And the same may be said in respect to the claim, asserted for the first time in this court, that the appellant was a purchaser for value, and without notice of Norwood's claim, and therefore not affected thereby. It is not so charged in the bill, nor is it shown by the evidence, and the contrary is emphatically averred by Norwood in his answer. The decree is affirmed.

HINTON, J., dissented.

DECREE AFFIRMED.

Richmond.

HUNTER v. BEACH.

APRIL 2nd, 1885.

CONSTRUCTION OF DEEDS—*Case at bar*.—In 1865, H. conveyed in trust, to secure a debt to B., the west half of his land, whereon a debt to M. had already been secured. In 1876, H. conveyed the east half in trust, to secure, (1) the interest on a debt to D., and (2) the interest and principal of the other debts secured on any portion of said land, out of the rents, &c., thereof, during five years; and in trust that, if the debt to D. was not paid in that period, then the trustee should sell the property, and pay (1) the debt to D; (2), anything remaining of the other debts therein provided for; and (3), the remainder to H. In 1880, H. contracted to marry S., and, in consideration of the marriage, conveyed to her the east half. The west half was sold under a decree of court, and its proceeds were consumed in paying the debt to M., leaving B. no other security than the trust on the east half; and the debt to D. being overdue and unpaid, B., in 1881, brought his suit to enforce said trust for his own benefit, subject to D.'s debt.

HELD:

B.'s debt is embraced in the deed of trust on the east half, subject to
● D.'s debt.

Appeal from decree of circuit court of Alexandria county, entered November 8th, 1882, in the suit of S. Ferguson Beach against Alex. Hunter and others. The object of the suit was to construe and enforce for the payment of a debt due by Hunter to Beach, a trust deed on the east half of Hunter's tract of land called "Abington," in said county, which the latter had, in consideration of marriage, subsequently conveyed to Alice A. Swain, who, later, became his wife. The decree of the cir-

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cuit court was in favor of Beach, and from it Hunter and wife obtained an appeal to this court.

Opinion states the case.

Charles E. Stewart, for the appellants.

G. A. Mushbach, for the appellee.

RICHARDSON, J., delivered the opinion of the court.

The single question in this case is, is the debt due by the appellant, Alex. Hunter, to the appellee, S. Furguson Beach, secured by the trust deed from said Hunter to Arthur Herbert, trustee, of date February 15, 1876?

The case is this: In 186—, the estate known as “Abington,” in Alexandria county, the property of Alex. Hunter, and situated on the Alexandria and Washington railroad, about midway between the cities of Alexandria and Washington, in the District of Columbia, was sold by the direct tax commissioners appointed for the state of Virginia under the act of congress, of June 7th, 1862, entitled, “An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,” as having been forfeited to the United States under the provisions of said act.

The “Abington” estate consists of some 500 acres of land, situated on said railroad as aforesaid, and divided thereby into two nearly equal parts, the part on the east side of said road, and between it and the Potomac river, being much the more valuable.

In 1865, the appellee, S. Furguson Beach, an attorney-at-law, was employed by the appellant, Alexander Hunter—to whom the estate would belong, if the supposed forfeiture could be set aside—to institute and carry on the legal proceedings necessary for its recovery. After long and laborious litigation, extending through the whole succession of courts, from the circuit court

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of Alexandria to the Supreme Court of the United States, (see *Bennett v. Hunter*, 18 Gratt. 100, and *Bennett v. Hunter*, 9 Wall. 326) the estate was restored to said Hunter.

For the services thus rendered, and for some cash advances made in aid of the litigation on Hunter's behalf, said Hunter executed to Beach two bonds, each for \$1087.50, dated March 21, 1872, and payable two years after date, with interest at the rate of eight per cent. per annum. As security for the payment of these bonds, said Hunter executed a deed of trust bearing even date with said bonds upon *the portion of "Abington" lying on the west side of the railroad*: there being on said *west half* of Abington at the time, a previous trust deed from said Hunter to C. W. Wattles, trustee, to secure to W. S. Mitchell a debt of \$2,346.85.

On the 15th day of February, 1876, said Hunter, by deed, conveyed all that part of Abington lying east of the railroad to Arthur Herbert, in trust to secure to Henry G. Dulaney the payment of six thousand dollars, evidenced by said Hunter's note to said Dulaney for that amount, of even date with said deed, payable five years thereafter, with interest from date, payable semi-annually.

Having thus conveyed said eastern, and far the most valuable half of Abington, to secure said Dulaney debt, the deed then proceeds: "And in further trust, to receive, collect, and take charge of the rents, issues and profits of the said tract of land, and apply the same to the payment of the interest on the said sum so due as herein specified, *and on the interest and principal of the other debts due by the said party of the first part, and secured on any portion of the said Abington estate*, for and during the said term of five years from the date of this deed, or on the principal of the debt hereby secured, provided there may be any surplus of said rents, issues and profits applicable thereto. And the said party of the first part, doth further *grant unto the party of the second part, the rents, issues and profits of the remaining portion of said Abington tract not hereinbefore conveyed*, subject to the

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same trusts, but without prejudice to the rights of the party of the first part to sell and convey away any portion of the remainder of said trust, and with the limitation of said trust as to any portion that may be sold by him to the time at which any such sale shall be made. And should the party of the first part fail to pay *the sum herein first secured when it shall fall due*, or should he fail to pay out of the rents, issues and profits of said lands as herein conveyed, or in some other manner, the interest *on said sum*, according to the tenor of his obligation, then, and in the event of his being in default for the period of thirty days, *the trustee herein* of the second part may proceed to sell the property hereby conveyed, at public auction, to the highest bidder, at some public place, &c., &c., upon terms of cash in hand for enough to cover costs and pay a reasonable amount of the sum for which there may be default, and of equitable credit for the residue: *and shall*, out of the proceeds of said sale, pay off and discharge, after paying costs and expenses, *first*, the said debt to said H. G. Dulaney; *second*, *anything remaining of the debts herein provided for*; and *third*, to pay over the remainder to the said party of the first part."

To bring sharply to view the point at issue, I have italicised such expressions therein as must control the construction to be given to this deed.

Later, to wit, on the 10th day of June, 1880, in consideration of a marriage then agreed upon and thereafter to be consummated between said Alexander Hunter and Alice A. Swain, the said Hunter by deed conveyed to said Alice A. Swain the eastern half of said "Abington estate," being the same conveyed in said deed of February 15th, 1876, to secure said Dulany, and for other purposes.

Arthur Herbert, trustee, accepted the trusts created by said deed of February 15th, 1876, and in the course of the execution thereof paid to the appellee, Beach, out of the rents and profits received by him, the sum of \$125, which was credited on the debt secured to Beach, leaving due thereon as of July

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21st, 1881, the sum of \$3,674. The other debt, that due to W. S. Mitchell, and secured on the west half of "Abington," was paid by the proceeds of a sale thereof, made under a decree of the circuit court of the county of Alexandria, in the suit of *Carlin v. Hunter et al.*, the proceeds being just sufficient, and no more than to pay the same, leaving Beach no other security than what he may have by virtue of the provisions aforesaid in the deed to Herbert, trustee, of 15th February, 1876.

In this state of circumstances, the Dulaney debt being overdue and unpaid, with accumulations of interest, S. Ferguson Beach, the appellee here, filed his bill in the circuit court of Alexandria, setting forth substantially the facts aforesaid, alleging that by the terms of said trust deed from Alexander Hunter to Arthur Herbert, the portion of the "Abington" estate east of the Alexandria and Washington railroad, is liable to the satisfaction of the debt due to said Dulaney and the debt due to said Beach; and to the end that sale be made thereof, for that purpose, prayed that Alexander Hunter, Arthur Herbert, Henry G. Dulaney and Alice A. Swain, be made defendants to this bill, &c., and for general relief. Since the institution of this suit, the marriage between Alexander Hunter and Alice A. Swain has been consummated.

Neither of the defendants answered the bill; and the cause having been regularly matured, came on to be heard in the circuit court of Alexandria county, upon the bill taken for confessed as to the defendants, Arthur Herbert, Henry G. Dulaney and Alice A. Swain, and the defendant, Alexander Hunter, then appearing by counsel, and consenting thereto, a decree was entered referring the cause to a commissioner to ascertain and report the liens and the order thereof, with their amounts, on that part of said Abington estate east of said road; and to state and settle the account of Arthur Herbert, trustee, under the deed of trust to him in the bill mentioned, &c.

The commissioner reported, (1) as the prior and superior lien on said eastern half of "Abington," the said debt secured

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thereon to Dulaney, being as of February 15, 1882, principal \$6,000, and interest \$1,680; and (2) the said Beach debt, being as of March 21st, 1882, principal \$2,275, and interest \$1,740. Those were all the debts reported as liens. The commissioner reported specially the claim by said Alexander Hunter that he had conveyed said eastern half of "Abington" to Miss Alice Swain, in consideration of marriage, shortly thereafter to be consummated. Afterwards, and before the cause was heard, Alexander Hunter and Miss Alice Swain were married, and then the said Hunter and wife excepted to said report in so far as it ascertained the Beach debt to be secured by the deed from said Hunter to Arthur Herbert, trustee.

The circuit court of Alexandria county, at the hearing, to wit: on the 8th day of November, 1882, entered a decree overruling the exception thereto, and confirming the said commissioner's report, and directing said land to be sold. From that decree the case is here on appeal.

On the part of the appellants it is insisted that Mrs. Hunter is a purchaser for valuable consideration (marriage) of the east portion of Abington, and as such the owner thereof, subject only to the lien of the Dulaney debt created by the deed to Herbert, trustee, of February 15th, 1876. The appellee, Beach, claims that his debt, originally secured on the west half of Abington, but subject to the prior lien thereon of the Mitchell debt, is also secured on the east half of said estate by said deed of February 15th, 1876, which is prior in point of time to the deed under which Mrs. Hunter claims.

The deed of February 15th, 1876, certainly had for its primary object the security of the Dulaney debt; nor does it by name secure or provide for any other debt. But, as we have seen from the language of the deed, after securing the Dulaney debt, the deed raises a further express trust in behalf of the *interest and principal* of the other debts due by Alexander Hunter, and secured on "*any portion* of said Abington estate." We have seen that the Beach debt was then secured on the west half

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of said estate, but was subordinate to the lien thereon by the Mitchell debt, and that said west half was subsequently sold and the proceeds entirely absorbed in the discharge of the last named debt. But the *further trust* thus raised, if read apart from and independently of the concluding paragraph in the deed, only dedicates the rents, issues and profits on the entire tract, for the period of five years and until the Dulaney debt became due, to the payment (1) of the interest on the debt, and (2) to the interest and *principal* of the *other debts* secured on *any portion* of said estate, which provision, to the extent named, necessarily embraced the Beach debt, which was theretofore secured on only the west part of said estate.

As to the rents, issues and profits thus dedicated, the trustee, Herbert, was directed to take charge of, receive and apply the same, according to the provision aforesaid. It will be observed that this provision of the deed, in respect to rents and profits, directed their application only to the interest on the Dulaney debt during the five years credit thereon, but to *principal* as well as interest on the Beach debt, thereby evincing an intention to better secure the Beach debt. This was then, clearly a provision for the Beach debt, for the period aforesaid, to the extent of the rents and profits, after paying the interest on the Dulaney debt; but this provision does not of itself devote the *corpus* of the estate conveyed by this deed (the east half), to the payment of the Beach debt. This, however, is done by the last clause in the deed, which provides, that in the event of default by Alexander Hunter of payment of the Dulaney debt thereby secured, when it becomes due, or on his failure to pay out of the rents and profits of said lands, or in some other way, the interest on said sum (the Dulaney debt), then, in the event of default therein for thirty days, the trustee, Herbert, was authorized to sell said east half, and after payment of costs and expenses, expressly directs the proceeds to be applied, first, to the discharge of the Dulaney debt; second, to *anything* remaining of the debts therein provided for; and third, to pay over the remainder to the said

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Hunter. Unquestionably, by the preceding clauses, the Beach debt was embraced, and provision made therefor out of the rents and profits to arise during said period of five years; and inasmuch as, at the end of that period, except the sum of \$125.00 paid thereon from said rents and profits, the Beach debt remained unsatisfied, with large accumulations of interest thereon; and inasmuch as, at the end of said period, the default in respect of the Dulaney debt, provided for, had occurred, the case provided for by the deed arose, and the *corpus* of the east half of said estate became charged with the payment of the whole of the Beach debt remaining unpaid, after first discharging the Dulaney debt. That this is clearly the import of the deed, when all its provisions are looked to, there can hardly be a doubt. This being so, and the deed being long prior to the deed under which Mrs. Hunter claims, her rights are subordinate to those of the appellee Beach. There is no error in the decree appealed from, and the same must be affirmed, with costs to the appellee.

DECREE AFFIRMED.

Richmond.

CHRISTIAN & GUNN v. KEEN.

APRIL 2nd, 1885.

1. **MARRIED WOMEN—*Separate Estate—Alienation.***—A wife may make her separate estate liable for the debts of herself, her husband or any other person, unless the instrument creating the estate, expressly or impliedly, denies or limits such power, but the intention so to deny or limit must be clear. *Bain & Bro. v. Buff*, 76 Va. 371.
2. **IDEM—*Conveyances for advances to husband.***—Where real estate is granted to a trustee for separate use of married woman, free from her husband's debts, to be disposed of upon her written request, for reinvestment, the proceeds to be held for her benefit upon like restrictions, and she, her husband and her trustee unite in deed conveying the property to secure advances of money to be made by another to her husband, she has the power of alienation, and the grant of special power to dispose of the property in a particular manner, does not divest her of her general power to dispose of it in any other manner. *Finch v. Marks*, 76 Va. 207.
3. **IDEM—*Settlement to secure home.***—But where the settlement is not only to provide, but to secure a home for the wife and her children, the intention is manifest to withhold the power of alienation. *Bank of Greensboro v. Chambers*, 30 Gratt. 202.
4. **PRINCIPAL AND SURETY—*Change of contract.***—Surety is discharged by any change of contract, however immaterial, if made without surety's consent. *Dey v. Martin*, 78 Va. 1.
5. **MARRIED WOMEN—*Husband—Surety.***—Where the wife charges her property to secure a debt of her husband, she becomes the surety of her husband, and is entitled to all the rights of a surety. *Nermcewicz v. Gahn*, 3 Paige, 614.
6. **NEGOTIABLE INSTRUMENTS—*Acceptance—Payment.***—Payment, not ac-

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ceptance merely, entitles acceptor to sue the drawer. *Braxton v. Wil-
ling, Morris & Co.*, 4 Call, 288.

7. CASE AT BAR.—A credit on the account of the principal debtor should discharge *pro tanto* the lien on the surety's estate.

Appeal from decree of corporation court of town of Danville, entered September 6th, 1882, in an injunction suit, wherein Mary V. Keen, widow of John T. Keen, deceased, was plaintiff, and Edward D. Christian and Thomas H. Gunn, partners in the name of Christian & Gunn, were defendants. Mrs. Keen owned real estate in Danville, which had been conveyed to a trustee on the following terms: "For the separate use of the said Mary V. Keen, wife of John T. Keen, free from all debts of her husband; and if at any time she shall consider it to her interest to sell, or otherwise dispose of the said lot of land, and invest the proceeds thereof in other real or personal estate, the said trustee, whenever she shall signify in writing, her wishes in relation to such sale or other investment of the said property, shall make such sale or other investment, the proceeds thereof to be held by him for her like benefit, upon like conditions and with like restrictions as those first mentioned in this instrument."

John T. Keen, in 1876, bargained with Christian & Gunn to ship to them at Richmond, to be sold on commission, all tobacco bought by him, with such advances as they should make to him during that year. And in consideration of such advances, John T. Keen, his wife and her trustee, executed a deed dated 29th February, 1876, conveying said property to a trustee to secure any sums which might be due Christian & Gunn, after applying the proceeds of sale of the tobacco to the repayment of such advances. This arrangement proved successful. At the end of the year it was renewed until March 1st, 1878, and a similar deed was executed by the same parties on March 1st, 1877. The transactions of this year resulted in a balance of about \$6,000 due from John T. Keen to Christian &

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Gunn. The trustee in the last deed was proceeding to sell the property when he was enjoined by Mrs. Keen, her husband having died in the meantime. In her bill, she denied that she had the power, under the settlement, to execute the said deeds. She claimed that there had been no proper settlement of the accounts between her husband and Christian & Gunn; that a part of the balance for which the sale was to be made had accrued in the preceding year, and was not covered by the second deed; and that the terms of the arrangement had been changed without her knowledge or consent, and that she had thereby become discharged, she and her property being only surety.

The injunction was perpetuated, and from the decree so perpetuating the injunction, Christian & Gunn obtained an appeal to this court.

Christian & Christian and *W. W. Gordon*, for the appellants.

Peatross & Harris, for the appellee.

LEWIS, P., delivered the opinion of the court.

It appears from the deed of settlement, a copy of which is exhibited with the bill, that the property was conveyed "to be held in trust * * for the separate use" of the wife, "free from all debts heretofore contracted, or which may hereafter be contracted" by her husband. It is very clear that this language, standing alone, would confer on the wife not only a separate estate, but the power of alienation; that is to say, it would empower her to dispose of the rents, issues and profits, in the same way as if she were a *feme sole*, and to dispose of the *corpus* of the estate by will, or in the mode prescribed by law for the alienation of real estate by married women. The *jus disponendi* is an incident to such estate, and may be exercised by the wife, unless restrained expressly or impliedly by the instrument creating the estate. She may therefore encumber the trust sub-

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ject, in the absence of such restraint, as well for the payment of her husband's debts as her own, notwithstanding, as in the present case, it is in terms directed to be held by the trustee free from the debts of the husband.

In *Vizonneau v. Pegram*, 2 Leigh, 183, certain personal property was bequeathed to a trustee "to be held in trust" as the separate estate of the testator's daughter, a married woman, free from the marital rights of her husband. It was decided by this court, reversing the decree of the lower court, that she had the power to dispose of the bequest in the same manner as if she were a *feme sole*.

In the recent case of *Averett v. Lipscombe*, 76 Va. 404, a testator devised property, "to be settled to the separate use" of a married woman, "so that neither said property, or its proceeds, nor profits, shall be liable for the contracts or debts of her husband." Construing this language, the court said: "The first branch of the sentence alone was sufficient to create a separate alienable estate. In *Tullett v. Armstrong*, 1 Beavan, 1, so often cited with approbation by this court, Lord Langdale lays down the following as one of the rules deduced from the authorities: 'If the gift be made for her [the wife's] sole and separate use, without more, she has during the coverture an alienable estate independent of her husband.' It is very common, however, to add some such words as are found in the latter branch of the sentence, 'so that neither said property, or its proceeds, nor profits, shall be liable for the contracts or debts of her husband.' They are added *ex abundanti cautela* to exclude in terms the rights of the husband, not to limit the powers of the wife. As said by Lord Eldon, in *Parks v. White*, 11 Ves. 222, in reference to other words relied on in argument as restrictive, they are 'only the unfolding of all that is implied in a gift to the separate use.' "

These principles are firmly established as the law of this state, by numerous decisions of this court. *Penn v. Whitehead*, 17 Gratt. 503; *Muller v. Bayly*, 21 Id. 521; *McChesney v. Brown's*

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heirs, 25 Id. 393; *Burnett & wife v. Haupe's ex'or*, Id. 481; *Darnall & wife v. Smith's adm'r*, 26 Id. 878; *Burgin v. McDowell*, 30 Id. 236; *Justis v. English*, Id. 565; *Garland v. Pamplin*, 32 Id. 305; *Frank & Adler v. Lilienfield*, 33 Id. 377; *Bain & Bro. v. Buff's adm'r*, 76 Va. 371; *Finch v. Marks*, Id. 207.

In the present case, however, in addition to the language already quoted, the deed of settlement contains the following provision: "And, if at anytime, the said Mary V. Keen shall consider it to her interest to sell, or otherwise dispose of the said lot of land, and invest the proceeds thereof in other real or personal estate, the said W. W. Keen, Jr., trustee as aforesaid, whenever the said Mary V. Keen shall signify in writing her wishes in relation to such sale, or other investment of the said property, shall make such sale or other investment, the proceeds thereof to be held by him for the like benefit of the said Mary V. Keen, upon like conditions, and with like restrictions, as those first mentioned in this instrument."

It is insisted by the appellees that the effect of this language is to exclude the power of alienation, except for the purpose of reinvestment, and that the mode of alienation thus prescribed is in exclusion of any other, on the principle of *expressio unius est exclusio alterius*. An opinion in favor of this rule of construction was expressed by Judge Tucker in *Williamson v. Beckham*, 8 Leigh, 20. But in the case of *Lee v. The Bank of the U. S.*, which soon afterwards arose, and is reported in 9 Leigh, 200, the contrary doctrine was held by the court. In that case certain real estate was conveyed to a trustee for the separate use of Mrs. Lee, and after her death for the use of her husband; and lastly, after his death, for the use of her devisees or heirs, to be conveyed to them in such portions as she by her will should direct, or as the law of the land should determine. The wife afterwards united with her husband in a deed of trust on the land, to secure the payment of a debt due by him to the Bank of the United States. And, the question was, whether the express power to devise the estate took from her the power

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to convey it by deed in her life-time. The opinion was delivered by Judge Cabell, who said: "I cannot perceive the force of the argument which infers diminution of power from its extension. I cannot perceive how the express grant of a power which the wife without such grant *had not*, can be made to take from her a power which she *had*, without the grant and independent of the grant. * * Admitting that *expressio unius est exclusio alterius* when personal estate is the subject, I think that the argument founded on it, when applied to real estate, fails to prove that which it is adduced to prove. Let it be remembered that a *feme covert* is under a legal disability to convey by her *own sole act in any form* her separate real estate in cases where the instrument giving her the estate is silent as to the power of alienation. The express grant of a power to convey the estate in a particular form is therefore nothing more than a dispensation from one species of disability; and if there is any force in the argument founded on the maxim *expressio unius*, etc., its sole tendency is to exclude the dispensation from all other disabilities, and therefore to leave all other disabilities in full operation. But the implied, or even express permission of existing legal disabilities to remain in force, is no proof of intention to take away existing legal rights; one of which, in the case of a married woman, is the right to convey her separate real estate with the concurrence of her husband." It is to be observed that that case arose before the passage of the statute allowing a married woman to devise her separate estate, and was heard by three judges only, one of whom, Judge Tucker, dissented. But in the later case of *Woodson v. Perkins*, 5 Gratt. 345, the same doctrine, it would seem, was held in the unanimous opinion of the court, delivered by Judge Allen. It is true that in some of the cases subsequent to the one last mentioned, the question is referred to as "still unsettled." But after all, it is a question of construction, to be determined on the particular facts and circumstances of each case, remembering that while in the creation of a separate estate, restrictions

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on the power of alienation, express or implied, may be imposed, the intention to do so must, in either case, be clear. *Bain & Bro. v. Buff's adm'r*, *supra*; *Frank & Adler v. Lilienfeld*, *supra*; *Finch v. Marks*, 76 Va. 207.

In the present case the wife is the sole beneficiary in the deed of settlement. The property is conveyed for her exclusive benefit; nor is its management and control confided to the trustee. The case is therefore unlike the case of the *Bank of Greensboro v. Chambers*, 30 Gratt. 202. There the intention to withhold the power of alienation was implied from the manifest purpose of the deed of settlement, not only to provide, but to secure a home for the wife and her children. And substantially the same may be said of the cases of *Nixon v. Rose*, 12 Gratt. 425; *Ropp v. Minor*, 33 Id. 97; *Bailey v. Hill*, 77 Va. 492, and other similar cases to which counsel have referred. Here, as we have seen, the legal effect of the language by which the trusts are declared is to give to the wife the power of alienation; but not the power to dispose of the corpus of the estate in her lifetime, except by deed with the concurrence of her husband. And this we are to presume the grantors knew, for such is the settled law of the state. It was natural, therefore, that, having conveyed the property for her sole benefit, and having invested her with the discretion to determine for herself the propriety of a sale and a reinvestment of the proceeds, they should empower her by her sole act, independent of her husband, to effectuate her wishes in these particulars. Accordingly, the provision was added, which requires the trustee, upon her written instructions, to sell and make reinvestment according to her directions. It might happen that she should deem it to her advantage to sell the property for the purpose of reinvestment, and yet, without this additional provision in the deed, she would be powerless to do so, in the event of the inability or refusal of her husband to unite with her in a deed of conveyance. It was doubtless for this reason that the special power was conferred. But does the grant of the special power

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take from her any power that she already had? We think not. There is nothing in the deed or the surrounding circumstances to warrant the conclusion that such was the intention of the parties. The principle affirmed in *Lee v. The Bank, supra*, is decisive of the question before us, and consequently the trust deed of March 1st, 1877, constitutes a valid and binding incumbrance on the property in question.

The appellees, however, insist that, conceding this to be so, the lien was discharged by a change in the contract between the appellants, on the one hand, and the husband of the female appellee on the other. It is well established, that a surety is discharged by any change in a contract for which he is bound, if made without his knowledge or consent. And this is so, even though the change be for the surety's benefit; for he has a right to stand upon the very terms of his contract, and cannot be held liable otherwise than he has contracted. *Callaway's ex'or v. Price's adm'r*, 32 Gratt. 1; *Dey v. Martin*, 78 Va. 1; *Miller v. Stewart*, 9 Wheat. 680; *Smith v. United States*, 2 Wall. 219. And it is equally well established that, where a wife creates a lien on her own property as security for the payment of a debt of her husband, she occupies the position of a surety for her husband, and is entitled to all the rights of a surety. *Nermcewicz v. Gahn*, 3 Paige, 614—affirmed on appeal, 11 Wend. 312.

Here it is claimed that a quantity of tobacco, which under the contract between the parties ought to have been shipped to this city for sale by the appellants, was, without the knowledge or consent of Mrs. Keen, shipped to Durham, in the state of North Carolina, and there sold. But this position is not sustained by the proofs. It appears that the tobacco shipped to North Carolina was not purchased with moneys advanced by the appellants during the year beginning on the 1st day of March, 1877, but was purchased during the preceding year, and was therefore properly carried into the accounts between the parties for that year.

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Objection is also made to several items in the appellants' accounts aggregating the sum of \$3,400. This sum represents the amount of four drafts drawn by the husband of the female appellee on the appellants, and were accepted by them for the accommodation of the drawer. They were drawn and accepted prior to, but fell due and were paid after, the 1st of March, 1877, and were therefore properly charged in the accounts as of the date of their payment. And it matters not that they were discounted in bank for the drawer before their maturity; for until they were actually paid there was no cause of action against the drawer on the part of the appellants, and from that time only did interest and the statute of limitations begin to run. This is well settled.

In his work on Negotiable Instruments, Mr. Daniel says: "If the acceptance be for the drawer's accommodation, the acceptor does not thereby become entitled to sue the drawer upon the bill; but when he has paid the bill, and not before, he may recover back the amount from the drawer in an action for money had and received." 1 Daniel on Nego. Instruments, sec. 532. In *Brarton v. Willing, Morris & Co.* 4 Call, 288, it was held that the acceptance of a bill does not entitle the acceptor to charge it in account against the drawer from the date of acceptance, unless he pays the whole money at the time. See also *Whitcell v. Brigham*, 19 Pick. 117; *Henderson v. Thornton*, 37 Miss. 448; *Snydam v. Combs*, 3 Green (N. J.), 133; *Parker v. United States*, Pet. C. C. 262.

There is, however, an admitted error in the accounts of \$1,116.57, which sum represents a credit on the books of the appellants in favor of J. C. Skinner & Co., and which ought to have been credited to the account of J. T. Keen, as a discharge *pro tanto* of the lien on the wife's estate. The accounts will therefore be corrected in this particular, and the balance claimed to be due by the appellants, less the said sum of \$1,116.57, will be the true amount for the satisfaction of which the appellants are entitled to enforce the trust deed of March 1, 1877.

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The decree of the corporation court must therefore be reversed, and a decree entered here in accordance with the foregoing views.

LACY, J., dissented.

DECREE REVERSED.

Richmond.

TURNER v. TURNER.

APRIL 2ND, 1885.

1. *USURY—Judgment.*—Where an instrument on its face reserves more than the legal rate of interest, it is usurious in its inception, and judgment shall be rendered for the principal sum only, although the defendant may have filed no plea of usury. Acts 1874, ch. 122, sec. 8, p. 135.
2. *IDEM—Borrower—Relief.*—Where a borrower, who has paid no part of the principal, or usurious interest, comes into chancery under Code 1873, ch. 137, sec. 12, he must be required to pay only the principal sum loaned or forborne. Acts 1874, ch. 122, sec. 5.
3. *IDEM—Payments—Application.*—Where payments have been made on the usurious contract, which are merely credited on the bond, and not applied specially, borrower is entitled to have such payments deducted from the principal sum loaned or forborne.
4. *IDEM—Application of payments—Rule—Exception.*—To the rule that the creditor may apply payments when the debtor does not, there is the well recognized exception that he cannot apply them to what is no legal or equitable demand against the payer.
5. *IDEM—Quære.*—Whether or not the creditor can apply payments to usurious interest where debtor has made no application.

Appeal from decrees of circuit court of Greensville county, entered October 6th, 1881, October 27th, 1882, and December 2nd, 1882, respectively, in the cause wherein Samuel B. Turner, administrator of John S. Turner, deceased, and others, were plaintiffs, and E. L. Turner, trustee, and others, were defendants. Those decrees were in favor of the defendants, and the plaintiffs appealed.

Opinion states the case.

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L. D. Yarrell and Collier & Budd, for the appellants.

Friend & Davis, for the appellees.

HINTON, J., delivered the opinion of the court.

On the first day of February, 1875, John S. Turner executed a deed reciting an indebtedness by him to E. J. Peebles, guardian of E. L. Peebles, by bond of even date with the deed, in the sum of \$2,100, payable February 1st, 1876, with interest from date, at the rate of eight per centum per annum, and conveying to E. L. Turner, trustee, certain real estate in Greenville county, to secure the same.

In 1881, the obligor in the bond having, in the meanwhile, died, and the trustee being about to sell the property, the administrator and heirs of the said John S. Turner brought this suit, to enjoin the said trustee from making sale of the property, and for other purposes not necessary to be stated. The bill neither charges usury nor seeks a discovery. In the progress of the cause, however, the attention of the court was called, in the reports of both the trustee and commissioner, made to April term 1882, to the fact that the bond and deed of trust were usurious on their face; and, at the same term, the plaintiffs filed a petition, in which they set forth the same fact; assert that all payments made by the said John S. Turner, in his lifetime, must be applied wholly to the reduction of the principal; and ask that the trustee may be enjoined from selling any more of the real estate conveyed in the deed than may be necessary to pay off the balance of principal of the said bond, after applying all of the credits to the reduction of the principal of the debt alone. A jury was waived by the parties, and the case was submitted to the court. The court, in its decree, held that the obligor having, in his lifetime, paid the usurious interest, and a portion of the principal of the bond, the plaintiffs could not recover back the whole interest paid, but simply the excess paid over and

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above the legal rate of six per centum, and that the amount due upon the bond was to be ascertained by applying the payments made by the said John S. Turner, in his lifetime, first to the payment of the legal interest accrued upon the bond to the dates of the payments, respectively, and then to the principal of the bond. It also held that the defendants, S. L. Fuller and Ella L. Fuller, his wife (formerly E. L. Peebles), to whom the bond had been assigned by the guardian, were entitled to the lien and security of the deed of trust for the payment of the balance so to be ascertained, with interest from the date of the decree; and directed the trustee to proceed to sell as much of the property as might be necessary for that purpose. From this decree an appeal was allowed the administrator.

Now it seems perfectly clear that the court committed no error in holding this transaction usurious in its inception. The word "interest" is a technical word, and has a definite and well-understood legal acceptation. It imports a compensation taken for the loan or use of money; and in this sense it must always be taken and construed, except when it is made satisfactorily to appear that it was not used in its proper sense. Usury also, has a definite and well-understood legal meaning. It consists in taking more than the lawful rate of interest for the loan or forbearance of money. In this case, the reservation on the face of the instrument is of more than the legal rate of interest, and it is, therefore, usury. In such a case we agree with Justice Story, that there is no room for presumption: for the intent is apparent; *res ipsa loquitur*. 3 Pars. on Contracts, 107; *U. S. v. Waggener*, 9 Pet. 399. If, however, we had any doubt upon this point, the case seems to be covered by the terms of the 8th section of the act of March 24, 1874, Acts 1874, ch. 122, p. 135, which provides that where the contract or assurance is in writing, and usurious interest is provided for therein, judgment shall be rendered for the principal sum only, although the defendant may have failed to file a plea of usury.

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Our next inquiry will be as to the measures of relief in cases of this kind.

In *Marks v. Morris*, 2 Munf. 407, it was determined that no terms should be imposed upon a debtor by deed of trust, who wanting no discovery, yet found it necessary to apply to a court of chancery to stay the trustees from selling until the question of usury should be inquired into; but that the trustee should be enjoined from selling in such case, until by some proper proceeding to be instituted by the creditor, he should establish the validity of his contract; in which case, the injunction should be dissolved; and, in the other event, perpetuated. And the design of the tenth section of chapter 141 of the Code of 1849, which is the same as section 12 of chapter 137 of the Code of 1873, was, as Judge Moncure has pointed out, in *Brockenbrough's ex'ors v. Spindle's adm'rs*, 17 Gratt. 26, to adopt the principles of that case, and give to it the force and form of statutory law. The object and purpose of the enactment of section 12 of chapter 137, Code 1873, being then to afford the borrower, although plaintiff in the suit, the same relief to which the lender would be entitled if he were plaintiff seeking to make his claim available, the inquiry as to the measure of relief in cases where the debtor wants no discovery, but simply seeks to stay the trustee from selling until the character of the transaction can be inquired into, may generally, if not always, be resolved into the inquiry, what would be the measure of recovery to which the lender would be entitled were he, the plaintiff here, seeking to recover his debt. And this last inquiry seems to be answered by the 5th section of chapter 122, Acts 1874, which, by making the contract or assurance illegal as to the excess beyond the principal amount loaned or forborne, excludes the lender from recovering more than his principal sum. The principal sum loaned or forborne, therefore, is, we think, the amount which the borrower must be required to pay when he comes into chancery under the provisions of the twelfth section, without

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having paid any portion of the principal or usurious interest. But suppose, as in the case with which we are dealing, there have been payments made by the obligor to the obligee, which have been simply credited on the bond, and there is nothing which shows that any application of these payments was made either by the debtor or creditor? The question then arises whether such payments can be recovered back, or, what amounts to the same thing, be set off against the principal of the debt. That it can be so set off, in such a case, we have no doubt. There is this well-recognized exception to the rule that the creditor may apply where the debtor does not, "that the creditor has no right to apply the money paid to him to the satisfaction of what does not, nor ever did, constitute any legal or equitable demand against the party making the payment." 2 Chitty on Contracts, 1114 *et seq.* In *Gill v. Rice*, 13 Wisc. 553, the supreme court of that state held that when no directions have been given by the debtor, that the law would apply a payment upon a usurious contract, to the extinguishment of the principal sum loaned. And in *Stanley v. Rice*, the supreme court of Texas, held that the law would not apply a general payment, nor authorize the creditor to apply it, without the consent of the debtor, to the payment of usury. 16 Texas R. 201.

In *Mosely v. Brown*, 76 Va. 419, the debtor came into court charging usury, both in the inception of the contract and in the subsequent payments of interest for the forbearance. It appearing, however, upon the facts of that case, that the notes secured by the deed of trust were free from the taint of usury, but that illegal interest had been subsequently paid for the forbearance, the only question there presented was, upon what terms should the debtor be allowed to recover back the illegal interest so paid; but it cannot be doubted that if the debtor had been able to make good the other charge in his bill, namely, that the notes secured by the deed of trust were usurious in

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their inception, he would have been entitled to the relief afforded by the twelfth section of chapter 137, Code 1873.

Now, from what has been said, it will be seen that, in this case, there being no evidence that any application of the payments, which amount in the aggregate to \$1,722, was made by either debtor or creditor (if indeed the creditor could make such application, upon which point we express no opinion), that amount must be set off against the principal of the debt, amounting to \$2,100, and that a decree must be rendered for the balance of \$378, with interest from date of the decree, to-wit: December 1st, 1882.

The decree of the circuit court of Greenville county, being erroneous in the respect above indicated, it must be to that extent reversed, and a decree be entered here in accordance with the views above expressed, and that the cause must be then remanded for further proceedings, in order to a final decree.

RICHARDSON, J., dissented.

DECREE REVERSED.

Richmond.

RYAN V. THE COMMONWEALTH.

APRIL 2nd, 1885.

(HINTON, J., absent.)

1. CRIMINAL JURISDICTION AND PROCEEDINGS.—Questions of jurisdiction may be raised by demurrer; by motion for instructions; by motion in arrest of judgment, on general issue; and by writ of error.
2. IDEM—*Construction of Statutes*.—Unless a statute by its language, expressly or by necessary implication, demands such construction, it will not be construed as repealing a previous statute, or as being retrospective.
3. IDEM—*Case at bar*.—Prior to act of January 31, 1884, incorporating the city of Roanoke, and to act of February 25, 1884, creating the hustings court of that city, the county court of Roanoke county had jurisdiction of all offences committed within that county, which embraced what afterwards became the limits of that city. In May, 1884, in that hustings court M. R. was indicted for the murder of her husband, who died January 27, 1884, within those limits.

HELD:

The hustings court had no jurisdiction over the offence.

Opinion states the case.

G. W. Hansbrough, for the prisoner.

Attorney-General, F. S. Blair, for the commonwealth.

FAUNTLEROY, J., delivered the opinion of the court.

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This is a writ of error to a judgment of the hustings court of Roanoke City, rendered June 20th, 1884, on an indictment against Marcella P. Ryan, charging her with the murder, by poison, of P. H. O. Ryan; by which judgment, the sentence of death was pronounced upon her.

An inspection of the record of the said judgment and proceedings in the case, discloses, that the said hustings court erred in several particulars, to-wit:

In overruling the demurrer to the indictment, and to each count thereof, for want of jurisdiction; and in refusing to give the jury an instruction asked for by the prisoner, in the words and figures, following, to-wit: "The court instructs the jury that if from the evidence they believe that the offence in the indictment alleged against the prisoner was committed before the 31st day of January, 1884, (that is, before the passage of the acts of assembly creating the said city and the said court), then the jury shall find the prisoner *not guilty*, as charged in the indictment."

This instruction raises the question of the jurisdiction of the corporation court of Roanoke city to try and determine the offence, which is charged in the indictment to have been committed on the 27th day of January, 1884. Such question of jurisdiction may be appropriately raised by a motion for instruction; by demurrer; by motion in arrest of judgment on general issue; or by writ of error; the evidence showing that the deceased died on 27th of January, 1884, as alleged in the indictment. Harris' Cr. Law, 305; *Phillips' Case*, 19 Gratt. 519.

Prior to the 31st January, 1884, when the act was approved which incorporated and defined the limits of the city of Roanoke (if not up to February 25th, 1884, when the act was approved, which established a corporation court for said city, and defined how far and to what its jurisdiction extends), [Acts 1883-4, pp. 87 and 217], the county court of Roanoke county had exclusive original jurisdiction for the trial of all offences committed within the limits of said county (Acts 1877-8, p. 339, sect. 1.), and the

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deceased came to his death in what was then, that is, 27th of January, 1884, within the limits of the said county. Up to 31st January, 1884, the county court of Roanoke county certainly had exclusive jurisdiction to try the offence charged in this indictment, and that jurisdiction was not taken away from the said county court by the act incorporating the city of Roanoke, *for that act created no court.*

The act establishing the court, and defining its jurisdiction, was approved February 25th, 1884; and in order to extend the jurisdiction of the said court to this offence, it is necessary to repeal a statute (Acts 1877-8, chap. 17, sec. 1), and take away a vested jurisdiction, by mere implication; and to give the act establishing the court a retrospective operation beyond the date of its commencement; and, *ex post facto*, to consider an offence which was committed within the limits of Roanoke county as having been committed within the limits of the city, whose limits had not then been created or defined, when the language of the act, neither expressly nor by necessary implication, will warrant no such construction. A statute will not be repealed by implication, unless the latter (statute) is so inconsistent with the first that they cannot stand together. *Hogan v. Guigon, J.*, 29 Gratt. 705. In this case, construing the latter as prospective, there is perfect consistency between it and the former act. Repeal by implication is not favored by the courts; and the presumption is always against the intention to repeal, where express terms are not used; or there is no positive repugnance. *Vide Davies & Co. v. Creighton*, 33 Gratt. 698, and authorities there cited. And in *Crigler v. Alexander*, 33 Gratt. 677, the court says, "The general principle deduced from these authorities is, that no statute is to have a retrospect beyond the time of its commencement; and this principle is one of such obvious convenience and justice that it must always be adhered to, unless in cases where there is something on the face of the statute putting it beyond doubt, that the legislature meant it to operate retrospectively. And although the words of the statute may be

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broad enough, in their literal extent, to comprehend existing cases, they must yet be construed as applicable only to cases that may *thereafter* arise, *unless* a contrary intention is unequivocally expressed therein. Dwarris' Notes, 126." But even if the act establishing the court (February 25th, 1884,) be given a retrospect from that date, surely its retrospection could not be held to antedate the act of January 31st, 1884, which incorporated the city itself, and created and defined its limits. To give the city and its limits a locality before they were created and defined, would subject offences committed within those limits to the ordinances of the city, where they could be construed as violative of those ordinances before their ordainment, and thus make them *ex post facto*; which is the effect which the construction operated in this case by the hustings court of Roanoke city. This conclusion disposes of this appeal, and renders it unnecessary to pass upon the numerous other errors assigned. The demurrer to the jurisdiction of the court should have been sustained, the indictment quashed, and the case dismissed from the hustings court of Roanoke city, for want of jurisdiction to hear and determine the case.

JUDGMENT REVERSED.

Richmond.

STEBBINS & LAWSON v. BRUCE.

APRIL 9th, 1885.

1. **ASSIGNOR AND ASSIGNEE—Equities.**—It is settled law in this state that assignee of non-negotiable paper stands in the shoes of his assignor, and takes subject to all defences of debtor against assignor existing before notice of assignment. Code 1873, ch. 141, sec. 17.
2. **IDEM—Estoppel—Silence.**—Where after notice of assignment, debtor expressly or impliedly promises to pay the debt, he is estopped from setting up any defence he had against assignor. *Feazle v. Dillard*, 5 Leigh, 30. Mere silence will not operate such estoppel.
3. **IDEM—Notice—Effect.**—Legal effect of notice of assignment is not to make debtor disclose his defences, but to preclude him from setting up defences after acquired against assignor. *Gordon v. Rixey*, 76 Va. 694.
4. **IDEM—Subsequent promise—Conflict of evidence.**—Where by letter assignee notifies debtor of assignment, and latter answers that assignor was heavily indebted to him and that he ought to have credit therefor, and it does not appear that assignee was induced to alter his position by the answer, and the testimony is conflicting, and the jury finds for the debtor, the verdict will not be disturbed.

Error to judgment of circuit court of Halifax county, rendered April 7th, 1882, in an action of debt wherein Stebbins & Lawson, assignees of Thomas Bruce, were plaintiffs, and Alexander Bruce was defendant. The action was founded on a bond dated January 9th, 1878, executed by the defendant, for \$1,500, payable two years after its date, to Thomas Bruce, and by him assigned, 17th January, 1878, to the plaintiffs, for a certain sum, part paid in cash and for balance note given at four months. By transactions between Thomas and Alexander

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Bruce, on 10th February, 1878, the liability on the bond ceased, though it was not surrendered or demanded. The assignees notified the obligor of the assignment on 14th February, and the latter made no reply. They then paid the note, and in January, 1879, again wrote to Alexander Bruce about the bond, when he replied: "Thomas Bruce is heavily indebted to me, and I ought to be entitled to a credit on the note to the amount of his indebtedness to me." To the action on the bond Alexander Bruce set up offsets acquired by him against Thomas Bruce before notice of the assignment. There was much conflict of testimony. There were three trials. At two the juries failed to agree. At the third the jury rendered their verdict for the defendant. This verdict the plaintiffs moved to set aside. The court overruled the motion, and entered judgment in accordance with the verdict; and the plaintiffs were awarded a writ of error.

Wood Bouldin, Jr., and W. W. Henry, for the plaintiffs in error.

This case comes up on a certificate of the facts proved at the trial before a jury, and exceptions to the rulings of the court below on the law applicable to such facts.

No rule of law which forbids a court to interfere where a jury has weighed conflicting evidence can possibly apply. The simple question is, Did the court below err as to the law applicable to the facts certified and just inferences therefrom? *Slaughter v. Tutt*, 12 L. 147.

The first ground of error assigned was the refusal of the court to give the instruction asked for by the plaintiffs in these words: "If the jury shall believe from the evidence that the bond sued on in this case was assigned to the plaintiffs on the 17th of January, 1878, by Thomas Bruce, to whom it is payable, and that part of the consideration of said assignment was a note of the plaintiffs to Thomas Bruce, payable at four months

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from that date, and that the defendant was notified by the plaintiffs of the said assignment by a letter dated the 14th of February, 1878, and received by defendant on that day, or the next day, and that the defendant did not inform the plaintiffs of any failure in the consideration of the said bond, and did not inform the plaintiffs of any claim of offset whatever until the 10th January, 1879, and then claimed that the said Thomas Bruce was heavily indebted to him; which said indebtedness should be credited on the said bond. And if the jury shall further believe from the evidence that the plaintiffs were induced by the said silence of the defendant to pay their said note given in part consideration of the said assignment, and that the said Thomas Bruce, on the said 10th January, 1879, was greatly embarrassed, if not insolvent, and is now insolvent, then the jury should consider that the said conduct of the defendant has deprived him of the right to rely on the matters set forth in his said pleas as a defence to this suit, and they must find for the plaintiffs."

The court added the words, "to the amount so paid"; thus restricting the recovery to the amount of the note given by the plaintiffs on the purchase of said bond, and subsequently paid by them, and gave the instruction with this restriction.

The learned counsel for the appellee claim that the instruction given was "logical" and that refused was "illogical." The error of the learned judge below, thus attempted to be sustained here, consists in an entire misapprehension of the rule of law embodied in the instruction asked for. The rule of law evoked by the plaintiffs is that known as *estoppel in pais*, and is expressed by Lord Coke (Co. Lit. 252a), in these words: "Estoppel cometh of the French word *estoupe*, from whence the English word stopped; and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."

Lord Wensleydale states the rule thus: "If any person, by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agree-

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ment or license, whether the party intend that he should do so or not, it has the effect, that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." *Cornish v. Abington*, 4 H. & N. (Excheq.) 555. Baron Bramwell, in the same case, says: "The rule is, that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall afterwards be estopped from denying it." The Supreme Court of the United States has stated the rule both for courts of equity and law in these words: "What I induce my neighbor to regard as true, is the truth as between us, if he has been misled by my asseveration." *Keik v. Hamilton*, 102 U. S. 76. And in *Dickinson v. Colgrove*, 100 U. S. 580, that court said: "The vital principle is, that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. It involves fraud and falsehood, and the law abhors both."

If the obligor had been informed of the intended purchase of his bond before it had been assigned, and had concealed his defence, it will not be contended that he could afterwards set up such defence against the assignee. And this would be true although the assignee may have given less than the face value of the bond on its purchase, and although the assignor may be solvent, and thus the assignee be in no danger of finally losing any part of the money paid out. In such a case, if the *logic* of the learned counsel for the appellee is to prevail, the plaintiff, assignee, can only recover the amount he may have been damaged, which may be nothing. But the law is well established that the plaintiff recovers the entire amount of the obligation. *Davis v. Thomas*, 5 Leigh, 1.

The same rule obtains when the obligor is informed of the assignment after it has been made, and so acts as to estop him-

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self from defending his bond, for the estoppel is the same in both cases and is based on the same equitable grounds.

Feazle v. Dillard, 5 L. 36; *Scott v. Jones*, 1 Brock. 247; *Watterman on Setoff*, 636-7.

The same rule applies to an account rendered and not objected to. *Towns v. Birchett*, 12 L. 193.

The judge certifies that it was proved that "on the 17th January, 1878, Thomas Bruce sold and assigned to the plaintiffs the said bond of \$1,500 for the sum of \$1041.54, which was paid as follows, to-wit: They let him have a horse valued at \$150, receipted an old account he owed them for \$83, gave him their note at four months for \$308.54, and paid him \$500 in money." "On the 14th February, 1878, * * Alexander Bruce received from the plaintiffs a letter in regard to the said bond for \$1,500, informing him that his said bond had been assigned to them by Thomas Bruce." "The defendant made no reply in writing to the said letter, and nothing passed between him and the plaintiffs in regard to the matter until about the time the bond of Alex. Bruce to Thomas Bruce for \$300 fell due"—19th January, 1879. "In January, 1879, the plaintiffs wrote a second letter to the defendant about the said bond of \$1,500 assigned to them by Thomas Bruce, and received from the defendant a letter," the substance of which is given hereinafter. "It was further proved that the plaintiffs paid, when it became due, their said note of \$308.54, given to Thos. Bruce in part payment of the purchase money for the \$1,500 bond, and one of them testified that they did so believing that the \$1,500 would be paid at maturity by Bruce," the obligor. [The note being given 17th January, 1878, payable four months after date, fell due and was paid 17th May, 1878, more than three months after the notice of the assignment sent the defendant.] "It was also proved that Thomas Bruce was insolvent * * in January, 1878, * * and had been so ever since."

It is thus seen that every fact grouped in the instruction ask-

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ed, was certified to have been distinctly proven, except the fact "that the plaintiffs were induced by the said silence of the defendant (after receiving notice of the assignment) to pay their said note given in part consideration for the said assignment." This fact is an irresistible conclusion from the facts proven, and therefore must be considered by this court as proved. *Gor'r for Fisher v. Vanmeter*, 9 L. 18; *Slaughter v. Tutt*, 12 L. 147; which are leading cases on this point.

Here the circumstances proved are the assignment by an insolvent of a bond, a part of the consideration being a four months' note of the assignees, payable to the assignor—a notice of the assignment to the obligor three months before said note fell due—the continued silence of the obligor, producing the impression on the assignees that the assigned bond would be paid at maturity, and while under that impression, the payment by the assignees of the said note given to the assignor. Now, as the assignees, on information of the obligor of a defence would have had a right to decline paying their note to the assignor, which would have been their natural protection against complete loss for the consideration given the insolvent assignor, the conclusion cannot be avoided that the silence of the obligor as to any defence was the *inducement* which caused the plaintiffs to pay their note, and thus give up their protection *pro tanto* against loss. Such a conclusion is consonant with the actions of men in their usual conduct of business, and must be drawn, in the absence of all conflicting evidence, as is the case here. *Greenleaf on Evid.*, sec. 38.

It thus appears that every fact going to make up the conclusion of law contained in the instruction asked, and given in a modified form, was established by the proof; and therefore the jury found contrary to the law and facts in finding for the defendant.

But in another view, the verdict of the jury was plainly against the law and facts. On the 10th January, 1879, nearly a year after the happening of the matters which the appellee

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claims made null and void his bond, and which were fully known to him, the appellee, in response to a second letter from the appellants, calling his attention to the assignment to them of his obligation, wrote as follows:

“With regard to the note you refer to, Thomas Bruce is heavily indebted to me, and I ought to be entitled to a credit upon the note to the amount of his indebtedness to me.”

This was a distinct admission by the appellee of the validity of the said bond, and an acknowledgment of his obligation to pay it to the assignees, with a claim to a right to offset so much of it as might be covered by the indebtedness of Thomas Bruce to him. An admission of a debt is in law a promise to pay it. And, therefore, the legal effect of this letter is a promise in writing to pay his obligation held by the appellants, except so far as he had a right to offset it by the debt of Thomas Bruce to him. Story on Contracts, sec. 707. On getting this letter the appellants were induced to believe that all they need concern themselves about was the claim to offsets, and so they took no steps to protect themselves against an entire failure of consideration. That they took steps to protect themselves against the offsets may be inferred from the fact of Thomas Bruce going to the appellee and offering to secure them.

The rule applicable to such a promise was clearly expressed in *Cleaton v. Chambliss*, 6 Ran. 90, as follows: “Any damage or any suspension or forbearance of his right, or any possibility of a loss occasioned to the plaintiff by the promise of another, is sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party undertaking.” The court to sustain this statement cites, among others, the leading case of *Pillans & Rose v. Van Meirap & Hopkins*, 3 Burr, 1663, decided by the Court of King’s Bench, Mansfield presiding. That case is strong authority for the appellants. There the plaintiffs paid a draft of White, who promised to reimburse them by a credit on the defendants. After paying White’s draft, the plaintiffs wrote to the defendants ask-

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ing whether they would accept their draft upon the credit of White, and received a reply that they would. But White failing, and having nothing in the hands of the defendants, the draft of the plaintiffs on them was dishonored. The defence relied on was *nudum pactum*, but the whole court held the defendants liable. Justice Wilmot said, "The mere promise to pay the debt of another, without any consideration at all, is *nudum pactum*, but the *least spark* of a consideration will be sufficient. The plaintiffs by this undertaking (of the defendants), and relying on it, were deluded and diverted from using any legal diligence to pursue White, or even to part with any effects of his which they might have in their hands. Therefore, this seems to be an irrevocable undertaking by the defendants." Justice Yates said, "The promise and undertaking of the defendants did occasion possibility of loss to plaintiffs. They were, or might have been, prevented from resorting to White, or getting further security from him."

The same reasoning is conclusive of the case at bar. Here the appellants could at once have taken steps to secure themselves with Thomas Bruce, their assignor, if warned of a defence of failure of consideration by the appellee. It is no reply to say that Thomas Bruce was then insolvent. He was in possession of large property.

He felt able to secure the appellee in every respect, and offered to do so. It is evident, therefore, that the admission by the appellee of the validity of the assigned bond, both by his silence after the first notice and by his letter after the second, occasioned not only a possibility of, but an actual loss to the appellants. And this was sufficient to sustain the promise to pay contained in said letter.

It is submitted that the judgment below should be reversed and the case sent back for a new trial on proper instructions.

Carrington & Fitzhugh and *J. W. Riely*, for the defendant in error.

LEWIS, P., delivered the opinion of the court.

It is the settled law of this state that the assignee of any bond, note or writing, not negotiable, stands in the shoes of the assignor; or, in other words, the assignment is subject to all the equities of the debtor against the assignor until notice of the assignment. Code 1873, ch. 141, sec. 17; *Norton v. Rose*, 2 Wash. 233; *Feazle v. Dillard*, 5 Leigh, 30; *Etheridge v. Parker*, 76 Va. 247. When, however, after notice of the assignment, the debtor promises the assignee to pay the debt, or by his conduct induces him to believe that he will, under such circumstances as that a retraction of the promise, if permitted, would operate as a fraud upon the assignee, the former is thereby estopped from afterwards setting up any defence which he may have had against the assignor. Thus, where after the assignment of a bond, the obligor, the assignor and the assignee all met together and agreed upon the credits to which the obligor was entitled, it was held that the bond was not subject to any set-off not embraced in such settlement. *Feazle v. Dillard*, *supra*. So, where the maker of a note, upon being informed of the assignment, replied that "he would see about that," and said nothing about any set-off against the assignor, it was held that he thereby waived the right to take advantage of the set-off which he afterwards sought to set up. *Albee v. Little*, 5 N. H. 277. So, it has been held that where the debtor gives his note for the amount of the debt to the assignee, and afterwards pays notes on which he was liable as surety, and the assignor is principle, he cannot, in an action on the note, set off such payments. *Waterman on Set-off*, see 589 *et seq.*

These decisions rest on the principle that a man is estopped on grounds of public policy and good faith from denying what by his conduct or representations he has induced others to act upon as true; or, in the language of Lord Coke, "a man's own act or acceptance stoppeth or closeth up his mouth to allege or

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plead the truth." And, on the same principle, it is contended by the plaintiff in error, that a like estoppel arises from the mere silence of the debtor when notified of the assignment; and in support of this position, reference is made to the case of *Scott v. Jones*, 1 Brock. 244. In that case, it is true, Chief Justice Marshall, in the course of his opinion, said: "The obligor in an assigned bond who has equitable discounts against it, ought to inform the assignee of his claims when notice of the assignment is given to him. In fair dealing he is bound to do this, that the assignee may take measures to secure himself against the assignor." But the case was decided on another ground, and the doctrine thus broadly asserted would seem to be in conflict with the decision of the Supreme Court of the United States in *Stewart v. Anderson*, 6 Cranch, 203. In that case an action was brought, under the statute of Virginia, by the indorsers of a promissory note against the maker, after notice of the transfer. When informed of the transfer the latter made no reply. At the trial the defendant pleaded an offset, which was a note executed to him by the assignor, but which was not due at the time of the assignment of the note sued upon, but became due and payable before the maturity of that note. The right to set up the offset was controverted by the plaintiff, but was sustained by the court.

In the present case, as in that, the defendant, when he received notice of the assignment, made no reply. It appears that the assignment was made on the 17th of January, 1878, and that notice thereof was not given until the 14th of the following month, though the parties lived in the same neighborhood. In the meantime, the liability of the defendant to the assignor had been released; and it seems somewhat remarkable that he did not at the time demand the surrender of the bond. But be that as it may, it is conceded that there was no cause of action against the defendant by the assignor at the time of the formal notice of the assignment, and that the plaintiffs took

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subject to all the defendant's equities against the assignor until knowledge of the assignment was acquired by the defendant.

The question then is, whether by reason of the latter's silence, when notified of the assignment, the plaintiffs now occupy a better position than did the assignor at that time? In determining this question, it is to be remembered that by the ancient doctrine of the common law, a *chose in action* was not assignable, the reason being, according to Lord Coke, that such assignments, if admitted, "would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of the terre-tenants, and the subversion of the due and equal execution of justice." Afterwards, however, courts of equity upheld assignments made in satisfaction of a precedent debt, and at a still later period all assignments on a good consideration. And the common law courts, following their example, took notice of the equitable rights of the assignee, when suit was brought for his benefit in the name of the assignor. In 1705 a statute was passed in Virginia authorizing the assignment of "any bond or bill for debt," and giving to the assignee the right to sue in his own name; but with the proviso that the defendant should be allowed all discounts that he could prove, either against the plaintiff or the first obligor. By subsequent statute these provisions were extended to promissory notes and to all writings obligatory whatever; and it was further enacted that all just discounts should be allowed the defendant, not only against the plaintiff, but against the assignor before notice of assignment. Green, J., in *Garland v. Richeson*, 4 Rand. 266; 2 Rob. Pr. (new ed.), 260, *et seq.* And such substantially is the statute as it now stands in the Code, chapter 141, section 17, which enacts as follows: "The assignee of any bond, note or writing, not negotiable, may maintain thereupon any action in his own name which the original obligee or payee might have brought, but shall allow all just discounts, not only against himself, but against the assignor, before the defendant had notice of the assignment."

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It will thus be seen that while originally no rights were acquired by an assignment of a *chose in action*, the rights of the assignee came in course of time to be recognized by the courts, and afterwards by statute, which at first made them subject to all the equities of the defendant, whether he had notice of the assignment or not, and now only to such defences as he may have had before notice of the assignment.

It has been repeatedly held that the statute did not intend to abridge the rights of the obligor, nor to enlarge those of the assignee beyond that of suing in his own name (*Gordon v. Rixey*, 76 Va. 694; *Feazle v. Dillard*, *supra*), and it is plain, we think, from what has been said, that the legal effect of notice to the obligor is not to oblige him to disclose to the assignee the defences he may have (for to do so might often be impracticable and even impossible at the time of receiving notice); but to preclude him from setting up any additional defence he may thereafter acquire against the assignor.

In the *Bank of Washington v. Arthur*, 3 Gratt. 165, it was held, that notwithstanding the obligor, in a bond tainted with usury, had acknowledged the debt, after notice of the assignment, and promised the assignee to pay it, he was not thereby estopped from afterwards setting up the defence of usury. And this was so, said the court, because, first, the promise to pay the assignee could not be treated as a new contract, the same being without a valuable consideration; and, secondly, because, under the circumstances of the case, the assertion of the defence could not operate as a fraud upon the assignee, inasmuch as the representations of the obligor were not made with fraudulent intent, and no loss was occasioned thereby to the assignee. The case was therefore unlike the case of *Pettit v. Jennings*, 2 Rob. Rep. 676, in which it was held, that where the assignee is induced to take the assignment of the debt by the assurances of the debtor that the same is just, and will be duly paid, the latter is estopped from setting up any defence he may have against the assignor, even though the debt

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be for a gaming consideration, and therefore void in its inception, provided the assignee before he accepted the assignment had no knowledge as to the consideration of the instrument assigned.

“The assignee,” says Prof. Minor, “taking, as he does in general, only an *equitable* interest, takes it ordinarily subject to all the equities which the debtor has, or may acquire, against the assignor before he has notice of the assignment, or as it is sometimes expressed, the assignee cannot be in a better condition than the assignor. Nor does it affect the application of this principle that the assignment is for value, and without notice, nor that *after* assignment the debtor acknowledged the demand to be just. * * * But whilst no acknowledgment made *after* assignment will preclude the debtor from proving, if he can, any equity against the assignor, acquired before he had notice of the assignment, he will be estopped from setting up any equity or defence, however well founded originally, if by his assurance *made beforehand* he has induced the assignee to acquire the debt.” 2 Minor’s Insts. 326. This, we think, is a correct statement of the law, subject to the qualification already adverted to, namely, that where, after notice of the assignment, the debtor expressly or impliedly promises the assignee to pay the debt, he will be concluded thereby, if the retraction of such promise would operate as a fraud upon the assignee. As where, relying on the debtor’s promise or admissions, the assignee takes no steps against, or to obtain additional security of, the assignor, who afterwards becomes insolvent, in consequence of which loss is sustained by the assignee. In this and other like cases where the assignee has been influenced to act, or to refrain from taking action, by the representations of the debtor, to permit the latter to repudiate those representations to the injury of the former, would be contrary, no less to the well-settled rule of the common law, than to the plainest principles of natural justice. And the same principle prevails in

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equity. . 1 Greenleaf on Evid. sec 207 *et seq.*; *Pettit v. Jennings*, *supra*, 2 Pom. Eq. sec. 812.

It is insisted, however, that prior to the notice of the assignment, and before the release of the defendant's liability to Thomas Bruce, the assignor, the defendant knew of the assignment to the plaintiffs, and consequently could not escape liability to the latter by anything that thereafter occurred. It appears from the certificate of facts that "it was proved" that on the 19th day of January, 1878, or two days after the assignment to the plaintiffs of the bond in question, the defendant, in a conversation with the obligee, said: "You have sold my bond to Stebbins & Lawson," and that he did not deny it. "But," the certificate continues, "the said Alexander Bruce (the defendant) denied that such conversation occurred." It is obvious that while the certificate purports to be a certificate of facts proved, it is in some particulars a certificate of the evidence only, and that here it must be construed as certifying merely that *it was given in evidence* that such a conversation occurred, and that the defendant denied that it did. This view is strengthened by the fact that the jury found for the defendant, after an instruction by the court, that if they believed from the evidence that at the time the liability of the defendant to the assignor was released, the former knew of the assignment, they must find for the plaintiffs, whether such knowledge was derived from the plaintiffs or from other sources.

The plaintiffs also rely on a letter addressed to them by the defendant nearly twelve months after the assignment of the bond, in reply to a letter from them, in which he claimed that the assignor was heavily indebted to him, and that he ought to be allowed credit for such indebtedness. This, it is insisted, was equivalent to a distinct promise to pay the debt, subject to credits when ascertained. But the jury, in the light of all the facts, found otherwise, and we see no reason to disturb the verdict. It does not appear that the plaintiffs were induced by the

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letter to alter their position, or that they have in any way been prejudiced thereby. Their note to the assignor, executed as part consideration for the assignment of the bond, had been paid, and the record shows that the assignor was not only insolvent at the time of the assignment, but has since continued so. The judgment is affirmed.

JUDGMENT AFFIRMED.

Richmond.

HARDY, TRUSTEE, & ALS. v. NORFOLK MANUFACTURING CO. & ALS.

APRIL 9th, 1885.

1. PARTNERSHIP—*Partnership property*.—Property bought for and appropriated to the purposes, and paid for with the funds of the partnership, is the property of the firm, though the legal title be held in the name of one of its members.
2. IDEM—*Liabilities—Discharge*.—As one member of a partnership may create a liability on the firm, so one member may discharge the liability of the firm.
3. JOINT-STOCK COMPANIES—*Stockholders*.—To the extent of his stock, each stockholder is liable individually for the debts of the corporation. Where stockholder pays the debt of the corporation and takes an assignment thereof to himself, he cannot revive that debt by assigning it to a third party.
4. IDEM—*Idem—Lien on property of*.—Where real estate, whereon is a lien, is conveyed to a joint-stock company, and a stockholder pays off the lien and takes an assignment thereof, the lien is extinguished as to the creditors of the corporation, and cannot be revived by his assignment thereof to a third party.
5. IDEM—*Idem—Idem—Estoppel*.—Where a vendor's lien exists on the real estate of the corporation, represented by a past due note, and the stockholders agree with the creditors of the corporation, that the latter shall give the corporation further time, the corporation will satisfy the vendor's lien, and convey its property free from liens, in trust to secure those creditors, and one of the stockholders shall satisfy that lien and take an assignment thereof to himself, he is estopped from claiming that lien as his own property, and an assignee from him *without* notice, if the note be *past due*, or an assignee from him *with* notice, if the note be *not* past due, stands in no better position than his assignor; and the trust deed lien of the creditors hath precedence.

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6. **DEEDS—Dates—Acknowledgment—Presumption.**—If a deed hath a date, the law presumes it to have been delivered at that date, and this though it was acknowledged for registry at a subsequent time. But this presumption of law must yield to proof to the contrary.
7. **TRUST-DEEDS—Omitted debts—Subsequent judgment.**—If a chartered company create a lien on its property for the purpose of giving preference to one or more creditors of the company over any other creditor, (except to secure a debt contracted at the time), such lien shall enure to the benefit ratably of all the creditors existing at the time of the creation of the lien. So, where a creditor under contract made before the creation of the lien, is omitted, and after that time obtains a judgment for unliquidated damages for breach of the contract, the lien enures for his benefit, ratably, with the other creditors. Code 1873, chapter 57, section 63.

Appeal from decree of hustings court of Portsmouth city, rendered 16th October, 1882, in suit of the Farmers and Merchants Loan and Trust Company and als. against H. C. Hardy and W. G. Elliott, trustees, the Norfolk Manufacturing Company and als. This case presents a contest over the property of the Norfolk Manufacturing Company, between deed of trust creditors, with debts aggregating over \$40,000, and parties claiming a vendor's lien for \$23,450. The property is a parcel of land in Atlantic city, adjacent to Norfolk city, improved with works and machinery of much value, which was conveyed, 18th November, 1872, by the Atlantic Iron Works and Dock Company to Marshall Parks, for \$70,350; for \$23,450 whereof a lien was reserved, represented by his note, which was actually the debt of the Norfolk Manufacturing Company, of which he was a stockholder and the general manager. By deed of same date Marshall Parks conveyed this property to the Norfolk Manufacturing Company, for the nominal consideration of \$250,000, the minimum capital stock of the company, and reserved no lien. This company was in much monetary embarrassment. Two judgments had already been entered, and twenty-four suits were pending against it. Of the twenty-five hundred shares of its capital stock, paid in only by means of the con-

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veyance of said property, twelve hundred and fifty were held by W. L. Lance for himself, his son, De Haven Lance, and W. Z. Hatcher, nine hundred and thirty-eight by M. Courtright, and three hundred and twelve by Marshall Parks, who were the corporators.

These stockholders, on 3rd December, 1872, proposed to pay their creditors twenty-five per cent. of their debts in cash, and to give them each two notes, payable in one and two years, and secured by deed of trust on the company's property, cleared of all prior liens. This proposition the creditors accepted, entered the judgments satisfied, and dismissed the suits. In making this agreement, W. G. Elliott represented the president of the company, M. Courtright, who was not present. M. Courtright and W. L. Lance, the substantial men of the company, then agreed to pay the twenty-five per cent. and the vendor's lien. W. L. Lance arranged with M. Courtright for his half of the sum needed. The latter agreed to pay off the twenty-five per cent. and the vendor's lien, and did so. He satisfied the vendor's lien to the Atlantic Iron Works and Dock Company, with claims against it, which he purchased; but he took an assignment to himself of the Marshall Parks note, which represented the vendor's lien. Later, he assigned that note, then past due, to the Farmers and Merchants Loan and Trust Company, by which parts thereof were assigned to the Bank of Portsmouth and others. He and his assignees then claimed that the said vendor's lien was still unextinguished and belonged to said assignees. The trustees differed in opinion. H. C. Hardy contended that the vendor's lien had been extinguished. W. G. Elliott insisted that that lien was still subsisting, and that it took precedence over the lien of the creditors created by the trust deed, which was executed by the company, and dated 1st January, 1873, pursuant to the said agreement of the stockholders with the creditors, whereby the property of the Norfolk Manufacturing Company was conveyed to Hardy & Elliott, as trus-

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tees, in trust to secure the balance due the creditors after the payment of the twenty-five per cent. of their debts.

The Farmers and Merchants Loan and Trust Company, for itself and others, then instituted this suit against the said trustees and others, claiming to own the said vendor's lien, and that it had precedence over the lien of the creditors under said trust-deed. The cause having been matured upon the bill of the complainants, and of the separate answers of the several defendants, M. Courtright, who took the part of the former, and W. L. Lance, who took the part of the creditors, and on depositions, at the hearing, the evidence being conflicting, a reference was made to a master to ascertain and report (among other things), the liens on the property and their respective priorities. He reported (among other things), that the vendor's lien had been extinguished by the taking up of the Marshall Parks note as aforesaid, and that the lien of the creditors under the trust deed was the first lien on the property. He also reported adversely to the claim of W. P. Beaman, a judgment creditor of the Norfolk Manufacturing Company for \$24,225.06, principal, interest and costs, which had been omitted from the trust-deed. The report was excepted to. The court sustained the exceptions, and decreed that the vendor's lien was still subsisting, was owned by the complainants, and took precedence over the lien of the creditors under the trust-deed, and sustained the rejection of the W. P. Beaman claim. An appeal and writ of supersedeas were obtained from this decree.

Opinion fully states the case.

J. Alfred Jones, Keen & Nelson, Leigh Robinson and John Goode, for the appellants.

Baker & Son, J. F. Crocker, W. G. Elliott, L. D. Starke and W. J. Robertson, for the appellees.

LACY, J., delivered the opinion of the court.

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This case is as follows: The Farmers and Merchants Loan and Trust Company, suing on behalf of itself, and of all other creditors of the Norfolk Manufacturing Company, filed its bill in the corporation court of Portsmouth city against Hardy & Elliott, trustees, the Norfolk Manufacturing Company, M. Courtright, W. L. Lance, Marshall Parks, De Haven Lance, W. Z. Hatcher, the Mercantile Bank of Norfolk, Virginia, and the Bank of Portsmouth, setting forth that by a deed, dated on the 1st day of January, 1873, the Norfolk Manufacturing Company conveyed to H. C. Hardy and W. G. Elliott, trustees, the entire property of the said company, to secure certain creditors of the said company named therein, the debts of the said creditors amounting to \$37,346.79, evidenced by eighty-six negotiable notes, one-half of the said notes being payable one year from date, and the other half payable two years from date; setting out in the bill the schedule of their debts, and exhibiting the said trust deed, by which it was provided that the said company should remain in possession and carry on business until default made in the payment of the notes at maturity and the interest. That the complainant was a large creditor secured in the said deed, and was the holder of said large debts secured in the said deed, and assigned to the said complainant for value. That default had been made in the payment of all the said notes, none having been paid. That the said company had since conveyed all its property to the defendant, W. L. Lance, who then held the equity of redemption in the said property. That the creditors secured under the said trust deed of January 1st, 1873, had directed the trustees named therein to sell under the said deed, and this had not been done. That the said trustees differed as to the rights of the creditors and the true construction and effect of the deed in question, and that it would be necessary for the court to settle the disputed questions arising under the said deed. That the said company was incorporated November 4, 1871, the capital stock to be not less than \$250,000, and the maximum cap-

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ital not more than \$1,000,000. with M. Courtright, Marshall Parks, W. L. Lance, De Haven Lance and Wm. Z. Hatcher as the corporators; the first-named was made president; the third, vice-president; the fourth, treasurer; and the second named to be general agent. That the said company through its geneal agent, Marshall Parks, purchased of the Atlantic Iron Works and Dock Company, their grounds and fixtures at \$70,350, and a lien was reserved on the said grounds and works by the said vendor, for \$23,450, in the deed of that company, dated November 18th, 1872; and on the same day, the said general agent of the company conveyed the said property to the Norfolk Manufacturing Company, at the price of \$250,000, and the said deeds are exhibited. And this was all the capital which was subscribed; and on December 3rd, 1872, this capital stock was divided into shares of \$100 each, and distributed as follows: to M. Courtright, 938 shares (\$100 each); to W. L. Lance, 1200 shares; to Marshall Parks, 312 shares; to De Haven Lance, 40 shares; and, to W. Z. Hatcher, 10 shares.

On December 21st, 1872, suit was brought by A. A. McCulloch, and judgment was obtained; and a judgment was also obtained by William Gilmer of William, and twenty-four other actions at law were pending against the company. In this condition of embarrassment of the company, an agreement was entered into between the incorporators of the said company, dated on the 3rd day of December, 1872, by which it was agreed, in view of the embarrassed situation of the company, as set forth above, it having become necessary to settle the liabilities of the company or to secure the same:

“First. That M. Courtright and W. L. Lance, do hereby agree to pay off and satisfy, each, one-half of the said vendor's lien still unpaid, to the Atlantic Iron Works and Dock Company, and to the payment of the same they do each bind themselves by these presents. That after the payment or satisfaction of the aforesaid lien, or before, if it should be found necessary, a deed of trust to a solvent trustee to be elected by the credit-

ors, should be executed, conveying all the property of the company, first, to secure the debts due to the creditors of the company, other than to members of the company; and, secondly, to secure the advances made by Courtright and Lance; and then the proceeds to be distributed among the incorporators according to their interests," etc.

This agreement was duly executed by the said parties. A meeting of the creditors of the company was then called by the vice-president, who was a director and the officer who had charge of the affairs of the company at Norfolk. At this meeting, which was held on the 7th of December, 1872, it was stipulated and agreed that, if the creditors of the company would forbear to press their claims, twenty-five per cent. would be paid in cash on all their claims, and their debts secured by a first lien on the property, and that the company would pay off the vendor's lien due to the Atlantic Iron Works and Dock Company.

As to this agreement there was no dispute, and it was clearly proved. And this agreement, after further conference among the parties, was carried out by the execution of the trust deed which was recorded June 7th, 1873. Thereupon, the creditors who had obtained judgments, entered them satisfied, and the other creditors, who had brought suit, dismissed their suits. The twenty-five per cent. was paid in cash, and the notes executed as agreed at one and two years. Shortly after the agreement, which was made at the meeting on the 13th of February, 1873, to-wit, on the 18th of February, 1873, Courtright and Lance arranged between themselves to carry out this agreement so far as they were concerned, and Lance arranged with Courtright for his one-half of the needed amount, and Courtright gave his receipt for the same, as follows, to Lance:

"Received from W. L. Lance twenty-five thousand dollars, in his coupon bonds, payable ten years after date to the Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, or bearer, secured, &c., left with me as collateral security for

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the payment of two negotiable notes of the said Lance, payable to my order, for \$10,000 each, payable ninety days after date, the proceeds of which said notes, when discounted by me, are to be paid on account of the indebtedness of the said Norfolk Manufacturing Company of Norfolk, to pay twenty-five per cent. of the debts of the said company which are unsecured; and also the balance due by the said company on account of their purchase of their property at Atlantic City, which is evidenced by a note of Marshall Parks to the Atlantic Iron Works and Dock Company for about \$23,000, and interest; and for which a lien is retained in their deed, &c., subject to which said Parks conveyed the said property to the said Norfolk Manufacturing Company. The said notes are made by the said W. L. Lance for the purpose of raising the amount of the one-half which he is to pay; and I am to pay from my own individual funds or property, the same, or like amount which is paid by him, *as heretofore agreed by an agreement made by the stockholders of the said company on or about the 3d day of December, 1872.*"

And it is provided that if the said Lance shall fail to pay the said notes, then the said coupon bonds are not to be sold at less than eighty per cent. of the par value thereof, without giving Lance thirty days' notice of an intention to do so. On this receipt Lance wrote, "These bonds were assigned by me to M. Courtright absolutely. April 17, 1873. W. L. Lance." The two notes of \$10,000 each, are exhibited with the deposition of W. L. Lance, with his name erased, and across them is written, "These notes have been settled by the acceptance of \$25,000 in Lance's coupon bonds, at 80 cents in the dollar," and on each the word "*settled*" is written.

The bill further sets forth that the said Courtright now claimed that the said vendor's lien had not been paid, but has been assigned to him for value, and that the said lien is still subsisting as a valid lien on the property of the company, and takes precedence over the lien of the trust-deed made to secure the creditors; and that this claim is sustained and supported

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by one of the trustees in the said trust-deed named, the said W. G. Elliott. That Courtright had assigned the said note of Marshall Parks for the said sum of \$23,450 to the Mercantile Bank of Norfolk, and the Bank of Portsmouth, Virginia, and that the said banks held the said note, and claimed that it was secured by the first lien on the property, which took precedence of the lien of the trust-deed of June 7th, 1873, and that this claim is sustained by the said trustee, W. G. Elliott. But, that H. C. Hardy, trustee, differed on this point with the said Elliott, trustee; asked that a receiver might be appointed; that there might be a sale of the property conveyed in the deed, and the proceeds distributed, first, towards the satisfaction of the debts secured by the trust-deed, and the surplus paid to the parties duly entitled thereto.

On the 27th of July, 1874, the cause came on upon this original and an amended bill, an injunction was awarded, and a receiver appointed to take possession of the property and make a sale thereof.

On the 20th day of February, 1875, Courtright, W. L. Lance and the Bank of Portsmouth filed answers, and the cause came on upon the papers formerly read, these answers separately, and the general replications thereto, and the cause was referred to a commissioner to take an account of the debts; to enquire "whether the lien for \$23,450, the vendor's lien, had been satisfied to the Atlantic Iron Works and Dock Company, or its assigns;" and if so, how, and by whom, &c.; also, as to the stockholders of the Norfolk Manufacturing Company, and the shares held by them respectively, and whether the said shares have been duly paid, &c.; and to take proof as to the several matters at issue in the cause, &c., &c.

The answer of Courtright denies that there was any undertaking by the company to pay off and satisfy the vendor's lien, and to give the creditors the first lien under the trust-deed executed for their benefit; claims that the vendor's lien was assigned to him; denies that W. L. Lance ever furnished any

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means whatever towards the payment of the said vendor's lien, and charges that the said lien has never been paid, in whole or in part; claimed that the note of Marshall Parks, secured by the vendor's lien, was assigned to him for value; that he had assigned it, and that there was a valid and subsisting lien therefor in favor of his assigns, which takes precedence over the lien of the trust-deed; that he had assigned the said note to the Mercantile Bank of Norfolk, &c.; that he was unable to discount the notes of Lance, and that as Lance could not pay his one-half, that *he did not pay his one-half*; that afterwards, he bought the debts against the Atlantic Iron Works and Dock Company, and had them assigned to him; that he so arranged with the creditors of the Atlantic Iron Works and Dock Company, that he bought the judgments, paying \$10,000 in cash, and gave his acceptances for \$10,000 more; *at the maturity of the said acceptances he retired them by paying a small portion in cash*, and borrowed the money from the Mercantile Bank of Norfolk, Virginia, upon the pledge of these judgments against the Atlantic Iron Works and Dock Company, as collateral security for the payment of his acceptance for certain drafts or bills of exchange which were discounted for his benefit. That shortly after the actual assignment to him of the said claims against the Atlantic Iron Works and Dock Company, which was made upon the retiring of the first aforesaid acceptances, an arrangement was made by him with the Atlantic Iron Works and Dock Company, by which he assigned to the said company his claims against that company, in exchange for the note of Marshall Parks, secured by the said vendor's lien for \$23,450, with interest; and this arrangement was confirmed by the corporation court of Norfolk city, in which a suit was pending between the Atlantic Iron Works and Dock Company and T. J. Corprew's personal representative and others, for the settlement of the affairs of the said company, by decree of the said court entered in that cause, on the 4th of August, 1873. By the said decree the president of the said company was di-

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rected to assign the said note to him; this assignment was made, and he then immediately substituted the said note, secured by the vendor's lien as aforesaid, as collateral for the said acceptances which had been discounted for his benefit, in the place of the said judgments and note (his claims against the Atlantic Iron Works and Dock Company) which he had surrendered to the said company. That when his acceptances to the bank matured, he was unable to meet them, and he then sold the Parks note to the said bank, and received his own indebtedness in part payment for it.

W. L. Lance in his answer distinctly asserts that the vendor's lien was paid off and extinguished in accordance with the agreement recited between himself and Courtright; that it was paid off by their (himself and Courtright) advancing a specific sum for that purpose; that it was the duty of the corporation to pay off and discharge this lien, and that it was done.

The banks named above answered, claiming the assignment without notice, and for value, and insisting on their right to the vendor's lien, as still subsisting and unsatisfied.

The depositions of the parties were taken, and the testimony of other witnesses.

The commissioner reported on the 27th day of November, 1880. In this report the vendor's lien is reported as satisfied and extinguished; an account of the debts is filed with the report; an account of the stockholders, and the shares paid in by them, as stated in the bill; and in his account of the debts, reported adversely to the claim of W. P. Beaman, a judgment creditor of the Norfolk Manufacturing Company for \$24,425.06, principal, interest and costs.

To this report exceptions were filed. And the cause coming on, on the 16th day of October, 1882, upon the said report, the exceptions thereto, etc., and the argument of counsel, the corporation court of Portsmouth held that this vendor's lien was not paid and satisfied, and was a valid lien upon the property, to which the said banks were entitled as a first lien on the

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property. That the lien of the trust-deed was the second lien, to which the creditors of the company secured in the deed were entitled ratably, and others, not secured in the deed, but allowed in the commissioner's report; sustained the commissioner in his rejection of the Beamer judgment; and held that Courtright was entitled to a third lien for a certain debt filed with his answer, and not reported by the commissioner; and appointed commissioners to sell the property not disposed of. From this decree an appeal was allowed to this court, June 4th, 1883.

The question first to be considered here, is as to the priority of the several liens asserted against the property of the Norfolk Manufacturing Company, which is the same property held by the Atlantic Iron Works and Dock Company, which was purchased from the said Atlantic Iron Works and Dock Company by the said Norfolk Manufacturing Company; for the purchase by Marshall Parks, the general agent, was a purchase for and by the Norfolk Manufacturing Company, to which last named company he conveyed it on the same day that he bought it; and it is a concession in the cause, and abundantly established, that the purchase by Parks was for the company, and the payments made by the company, so that the Marshall Parks note for the \$23,450, for the unpaid purchase money, was simply the debt of the company.

The ventures of the company all proving quickly disastrous, when the debts were pressed against the company by twenty-six suits at one term of the court, aggregating \$40,000, and other clamorous demands, the incorporators of the company being, as they were unquestionably, liable for these debts, to the amount of their stock, which aggregated nominally \$250,000, the agreement of Courtright and Lance to pay the unpaid purchase money due by the company, and to arrange satisfactory security for the other debts, was only an agreement to pay their own debts; and when Lance paid into Courtright's hands \$25,000, at 80 cents in the dollar, making \$20,000, to meet the vendor's lien, and the twenty-five per cent. of the debts secured

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by the trust-deed, the debt due for the vendor's lien became, as between Lance and Courtright, what it had all along been as to the creditors, *the debt of Courtright*, so that when Courtright acquired the debt by assignment, it was an assignment to him of his own debt, in any aspect of the case in which he shall be considered. The minimum amount of the stock of this company was \$250,000. Only about \$70,000 had ever been paid up by any and all of the stockholders. The stock and other property of private corporations is deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien or right of priority of payment on it, in preference to any of the stockholders in the corporation. Story's Eq. Jur. § 1252; *Bartlett v. Drew*, 57 N. Y. 578.

The liability of a stockholder is upon his subscription; that is to say, upon his obligation to contribute to the capital stock, which is a trust fund for the benefit of those to whom the corporation, as a corporation, becomes liable. The subscription is part of the assets of the corporation, at least so far as the creditors are concerned. *Surger v. Hoag*, 17 Wall. 610; *Patterson v. Lynde*, 106, U. S. S. C. R. 521; *Ladd v. Cartwright*, 7 Oreg. 329; *Webster v. Upton*, 1 Otto, 71; *Id.* 60 and 47; 22 How. 387.

In this case only \$70,350 had been paid, while Courtright's share was \$93,800, and W. L. Lance's share was \$120,000. Courtright had only paid up \$26,381.25, and Lance (W. L.) \$35,175.

The action of the company in agreeing to pay the vendor's lien, was an agreement to meet its own obligation. Courtright's assent might have fairly been presumed against him, upon the authorities of numerous decisions cited at bar. But in this case, the precedent authority and the subsequent ratification are both expressly given as has been seen. It is distinctly proved that Courtright received from Lance the funds necessary to pay off one-half of this debt, the subject of dispute here. The liability of the stockholder, to the extent of his liability under the charter, is not simply as such, but it is a personal liability as

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surety for the company. It is virtually and in effect a liability upon a contract, and the mutual agreement of the parties; not indeed, in form an express personal contract, but an agreement of equally binding obligation, consequent upon and resulting from the acts and admissions or implied assent of the parties.

The second ground is upon the view that the legislature, by subjecting the stockholders to personal liability for the debts of the company, thereby removed the corporate protection from them as corporators, and left them liable as partners and associates at common law; that is the clause which pledges to the creditors of the corporation the liability of the stockholders to the extent of their stock. Opinion of Mr. Justice Nelson, in *Hathorn v. Calef*, 2d Wall; *Woodruff v. Trapnall*, 20 Howard, 190; *Curran v. Arkansas*, 15 Howard, 304; *Moss v. McCulloch*, 7 Barb.; *Conant v. Van Shaick*, 24 Barb. 87.

But Courtright's liability is not dependent upon this construction of the law. He is so by his express and unequivocal contract.

That this real estate was the property of the partnership cannot be denied. It was purchased for and appropriated to partnership purposes, paid for out of partnership funds, and it is partnership property, although the legal title was taken in the name of one of the partners. Equity holds him trustee for the firm, and this may be proved by parol. Story on Partnership, § 92, 93; Story's Eq. Jur. § 694; *Hoxie v. Carr*, 1 Sumner R. 173; *Thornton v. Dix*, 3 Brown's Ch. Rep.; *Fairchild v. Fairchild*, 64 N. Y.; *Traphagan v. Burt*, 67 N. Y.; *King v. Weeks*, 70 N. C.

That the agreement of Lance as to this property, was binding on all the incorporators as the act of their accredited agent, cannot be doubted. Smith on Mercantile Law, p. 48, 58, 59, 61. And as an entire firm may be bound, so it may be obviously discharged by the act of one. Smith's Mercantile Law, 67; Story on Partnership, § 107. And the payment or satisfaction of a debt by one partner is a payment and extinguishment

of the debt as to all. That the partnership debt represented by the note of Marshall Parks has been paid, is abundantly proved, and indeed it is admitted. As to the original vendor, the debt is extinguished. The Atlantic Iron Works and Dock Company have no longer any claim upon it. It was surrendered to Courtright in exchange for its own indebtedness, and was transferred to Courtright; that is, he became his own creditor. The note was long past due when transferred to Courtright, and when he transferred it to the Mercantile Bank it had been paid by the person bound primarily for its payment. What was there in the note for Courtright to assign beyond his interest in it? And what that more than Courtright's obligation? and the assignee took it, subject to all the equities against Courtright; which being satisfied, left nothing for it to take, as they went to the entire obligation; the debt was extinguished. There was nothing left which Courtright could assign, or which the assignee could take. It was a non-negotiable note, assigned more than eighteen months after maturity to the bank at a discount of \$4,000.

As the assignee stands in the place and upon the rights of the assignor, he is subject to whatever defences may be made against the assignor. The assignee takes it subject to antecedent equities, and the assignee must allow all just discounts against the assignor.

What would have been the rights of Courtright against the property of this company if he had brought suit upon the note? What lien could he have enforced? This is answered by what has gone before. The debt being extinguished, the lien expires with it. A lien is a hold or claim which one person has upon the property of another, as a security for some debt or charge, and when the debt is paid, the right to subject or charge the property is gone and extinguished. *Prentice v. Zane*, 2 Gratt. 262; 41 Barb. 32; *Small v. O'Bannan*, 7 B. Mon.; *Bowen v. Thrall*, 28 Vermont, 382.

But it is an inevitable conclusion from the evidence and cir-

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cumstances of this case that the assignee had the fullest notice and knowledge of all the circumstances under which Courtright had acquired and held this note, and resorted to these methods to save, if possible, the debts already due to it by Courtright, rendered precarious by his failing circumstances. It follows that the corporation court of Portsmouth city erred in the decree complained of, in holding that the vendor's lien was a valid existing first lien on the property of the Norfolk Manufacturing Company, and the same must be reversed upon that ground.

The next question which is raised in this case is, that by its decree of the 16th of Oct'r, 1882, the corporation court of Portsmouth city, held that the said deed of trust, dated Jan'y 1st, 1873, and recorded June 7th, 1873, did not enure to the benefit of a judgment of W. P. Beaman, recovered in the corporation court of Norfolk city, June 13th, 1874, for \$20,000. The judgment was recovered against the said company on account of a breach of a contract made with the said company on the 11th of July, 1872, which breach occurred prior to the day when said deed of trust was recorded. The commissioner in said report, filed in the cause November 27th, 1880, disallowed this claim against the company, being of opinion that the said Beaman judgment was not such a claim as would, or should, be embraced in the account with the said deed of trust creditors. The claim of this judgment creditor is not disallowed by the said commissioner, nor by the court which confirmed the commissioner's report on this point, on any ground which goes to or affects the validity of the said judgment as a debt against the said company. This is admitted, or if not admitted, is established, and finally determined by the judgment of a court of competent jurisdiction, to which the company was a party, and from which no appeal has been, or can now be taken. But it is disallowed by the commissioner and by the court upon the ground that it is not included in the trust-deed, nor in the schedule of debts contained therein, and upon the ground that at the time of the execution of the deed, Beaman was not a creditor of the said

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company; the said commissioner saying, that under no circumstances could any portion of the said judgment (except that accruing between the 28th of March, 1873, the date of the release, and the 27th of May, 1873, the date of the acknowledgment of the deed) be considered. But this being a judgment founded upon a claim for unliquidated damages, where every matter is submitted to and determined by a jury, who consider all the circumstances, it would seem almost an impossibility for the commissioner to separate such a claim, or to apply or to apportion to different periods any certain or determined portions thereof.

The question of the effect of the release of the 28th of March, 1873, referred to by the commissioner, was drawn in question and settled in the suit at law between the parties, in the corporation court of Norfolk, and was not a subject for the commissioner's consideration; nor for the judgment of the corporation court of Portsmouth city; nor in this court in this case; it is *res judicata*. The claim of Beaman is not rested upon any such question. He appears before the commissioner and before the corporation court of Portsmouth city and proves his claim, presents his judgment for entry in the account of the debts of the company. The commissioner says he is not included in the deed. This is obvious. His debt is omitted from the schedule therein. He does not pretend that he is included in the deed. His claim is that at the time the deed was made, the creation of the lien of the deed of trust, dated January 1st, 1873, and recorded June 7th, 1873, he was an existing creditor of the said manufacturing company, and that the deed enured ratably to his benefit with all the creditors named therein, under section 63 of chapter 57 of our Code. By that section it is provided that—

“The stock of every such company shall be deemed personal estate, and be transferable in such manner as shall be prescribed by the by-laws of the company. And for all debts which shall be due and owing by the company, the persons composing

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the company at the time of its dissolution, shall be individually responsible to the extent of their respective shares of stock in said company, and no farther. And if such company shall create any lien or incumbrance on its works or property, for the purpose of giving a preference to one or more of the creditors of the company, over any other creditor or creditors, except to secure a debt contracted or money borrowed at the time of the creation of the lien or incumbrance, *the same shall enure to the benefit, ratably, of all the creditors of the company existing at the time such lien or incumbrance was created.*"

Such deed is not avoided by the statute, but is enforced for the common benefit of all existing creditors. This the decree of the court recognized, and the lien of this deed was held by the court in its decree to enure ratably to the benefit of certain omitted creditors, some of them for large amounts, along with the creditors named in the schedule of the deed, and specifically secured therein; but this judgment is rejected by the court upon the ground that Beaman was not an existing creditor at the time of the creation of the lien.

This deed was dated January 1st, 1873, but not recorded until June 7th, 1873. In the absence of proof to the contrary, it would be presumed to have been delivered on that date. If a deed has a date, the law intends it to have been delivered at that date, and this, notwithstanding a subsequent acknowledgment, but this presumption will yield to evidence to the contrary. *Raines v. Walker*, 77 Va. Rep. 92; *Harman v. Oberdorfer*, 33 Gratt. 497; *Harvey v. Alexander*, 1 Rand. 219; *Rodgers v. McCluer*, 4 Gratt. 81.

In this case it is an uncontroverted fact, that the deed was not executed on the day of its date; every witness who has testified in the cause proves that it was not agreed on and not delivered until long after the day of its date; and this intention of the law must yield to the clear proof in the cause.

The question remains, was Beaman a *creditor* of the company on the day of the creation of the lien of the trust-deed?

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It is admitted that the contract between the parties was made July 11th, 1872; that it was a purchase on the part of the company of timber and lumber from Beaman, needed by it in the prosecution of its business as a manufacturing company; that this timber and lumber were delivered to the company long before the creation of this deed of trust lien; that on the 28th of March, 1873, the company had made default on their acceptances, on account of this contract, and on that day arranged to meet these; and the contract proceeded between the parties according to its terms toward complete fulfillment, by the cutting and delivery of lumber by Beaman; and it is proved, that before the execution of the trust-deed lien, Beaman had given notice of his claim; that his claim for these damages was afterwards recovered; and that at one of the meetings of the company with its creditors, February 12th, 1873, the said Beaman attended by counsel, and filed his claim under this contract not yet determined as to amount, and his counsel was not only present, but acted as secretary of the meeting. Beaman was named in the deed as to the acceptances arranged on the 28th of March, 1873, which amounts were paid by the company not only before default made under the deed, but before the execution of the trust-deed, and before suit brought by the creditors. Under this deed it will be remembered the company obtained as to three-fourths of its debts, a credit of one and two years, and the one-fourth to be paid in cash was actually paid by the said company to the creditors named therein, and to others not named in the deed, but admitted by the company to be creditors.

Was Beaman a creditor of the company at the creation of the lien of the trust-deed? If so, the statute expressly prohibits the corporation from making a lien to prefer one or more creditors to him, it being declared, as we have seen, that all such liens of preference shall enure to the benefit of all the existing creditors ratably, unless the lien was created to secure a debt contracted or money borrowed at the date of the lien.

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A creditor is one who has the right to require the fulfillment of an *obligation* or *contract*.

Beaman, at the date of the creation of the lien, had furnished the company the timber and lumber, according to the terms of the contract made by the company with him. The company had not paid for it, and he was demanding payment therefor, and had served formal notice on the corporation of his claim, that the company was so indebted to him, for its failure to comply with its contract with him. The counsel for Beaman suggest this demand of his as the moving cause for the prompt execution thereafter of this trust deed, which had been prepared for months, and often discussed between the parties, but not before executed.

Whether this trust deed was made and executed to avoid this large debt or not, is immaterial. If Beaman was an existing creditor at the date of the creation of the lien, it was not in the power of the company to prefer one creditor over another. The law makes the deed the ratable security of all the existing creditors. The cause of action arose before the creation, the goods were delivered at the agreed price before the creation of the lien. If a man takes up goods of a tradesman, says Mr. Blackstone, upon an implied contract to pay as much as they are reasonably worth (in this case the contract was express, to pay an agreed price), the right accrues to the creditor, and is completely vested in him at the time the agreement is made, and the law only gives him a remedy to recover the possession of that right which already in justice belongs to him. In this case the verdict of the jury did not give him a new right, but ascertained an old one, which existed by virtue of the contract between the parties, and their transactions thereunder. We cannot but conclude that Beaman was a creditor at the time the trust-deed lien was created.

Does the trust-deed in question come under the exception in the statute provided? Was the lien made for a debt then contracted, or for money at that time borrowed? Its plain terms

refute the suggestion. It was given to secure debts before that time contracted, and the company borrowed no money at that time secured in that deed.

We reach the conclusion then, that under the law, Beaman is entitled to share, as to his judgment, ratably with the other creditors existing at that time, in the benefits of the said deed, whether secured therein or not. And the decree of the corporation court excluding him from its benefits is erroneous on that ground also, and must be reversed and annulled.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the corporation court of Portsmouth erred in its decree of the 16th day of October, 1882, in so far as it decided that the lien preserved by the Atlantic Iron Works and Dock Company in its deed to Marshall Parks, bearing date the 18th day of November, 1872, on the property therein conveyed, for \$23,450, with interest from the 8th day of March, 1871, has not been paid, satisfied and discharged, and that the same is a valid and subsisting lien on the property conveyed by the said deed, for the payment of the said sum, and is a first lien on the said property, and that the defendants, the Mercantile Bank, of Norfolk, Virginia, and the Bank of Portsmouth, as the assignees and holders of said note, are entitled to the said lien, and to the same as the first lien on the said property.

And the court is further of opinion that the said court erred in its said decree, in deciding that the lien created by the Norfolk Manufacturing Company, by its deed to the defendants, H. C. Hardy and W. G. Elliott, trustees, bearing date January 1st, 1873, is the second lien on the said property subject to the aforesaid vendor's lien.

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And the court is further of opinion that the said court erred in its said decree in deciding that W. P. Beaman was not an existing creditor of the Norfolk Manufacturing Co., as to his said claim, mentioned as Item No. 4, in Account No. 6, of the report of commissioner, C. W. Murdaugh, and disallowed by the said report, to-wit: a judgment against the said Norfolk Manufacturing Company for \$20,000, with interest thereon from May 22nd, 1874, and \$95.06 costs, at the time that the lien in the said deed in trust from the Norfolk Manufacturing Company to the said H. C. Hardy and W. G. Elliott, trustees, was created; and that the lien of the said deed in trust does not enure to the benefit of said W. P. Beaman as to his said claim.

It is therefore decreed and ordered that the said decree be reversed and annulled in so far as it is herein declared to be erroneous, and affirmed in all other respects.

And it is further decreed and ordered that the appellees do pay to the appellants their costs by them expended in the prosecution of said appeal aforesaid here.

And this court proceeding to correct the errors in the said decree of the corporation court of Portsmouth, it is decreed and ordered that the note of Marshall Parks for \$23,450, with interest from the 8th day of March, 1871, given to the Atlantic Iron Works and Dock Company, has been paid and satisfied, and that the lien reserved to secure the said note is extinguished, and that there is no lien on the property of the Norfolk Manufacturing Company therefor. And it is further decreed and ordered that the lien created on the property of the Norfolk Manufacturing Company in the trust-deed to H. C. Hardy and W. G. Elliott, trustees, recorded on the 7th day of June, 1873, and filed as exhibit "A" with the plaintiff's bill, is the first lien on the property of the said Norfolk Manufacturing Company, and that the said lien enures to the benefit ratably of all the creditors of the Norfolk Manufacturing Company existing at the time of the creation of the said lien, as ascertained in the said decree, and that the said W. P. Beaman was a creditor of

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the said company, whose debt was existing at the time of the creation of the said trust-deed lien, and that he is entitled to share ratably with the other creditors named in the decree, in the benefits of the said lien so created, as to his claim mentioned as Item No. 4, in Account No. 6, of the report of commissioner C. W. Murdaugh, being a judgment against the said company for \$20,000, with interest from May 22nd, 1874, and \$95.06 costs. And the said decree being corrected in accordance with the foregoing opinion and views herein, is affirmed in all other respects.

And it is further decreed and ordered that the defendants in the said corporation court of Portsmouth do pay to the plaintiffs, their costs by them expended in the prosecution of their suit in the said corporation court of Portsmouth.

Which is ordered to be certified to the said corporation court of Portsmouth.

DECREE REVERSED *in favor of Hardy and Elliott, as trustees, and of W. P. Beaman.*

Richmond.

BRANCH v. COMMISSIONERS OF SINKING FUND.

APRIL 9th, 1885.

1. NEGOTIABLE INSTRUMENTS—*Theft—Maker's liability*—Note payable to bearer has been delivered, stolen from *the owner*, and come to *bona fide* holder for value. Latter may recover on it against the maker. *Secus*, where the note has not been delivered, or if delivered, has been returned to maker, and stolen from *him*.
2. IDEM—*Coupon bond—Theft of—Maker's liability—Case at bar*.—Two coupon bonds issued by the state of Virginia, payable to bearer, are redeemed by the state, and other bonds issued in their stead. Later the bonds were stolen from the state treasury, came into the hands of B., a *bona fide* holder for value without notice of the theft, and by B. were presented to the commissioners of the sinking fund, to be funded into other bonds of the state. The commissioners refused, on the ground that the bonds had been stolen from the state treasury. B. applied for a *mandamus*.

HELD:

Mandamus denied.

Petition of Thomas Branch & Co. for a writ of *mandamus* to compel the commissioners of the sinking fund of the state of Virginia, to fund two coupon bonds of the state, numbered 7,742 and 4861, and dated August 4th, 1853, and January 1st, 1867, respectively, and payable to bearer; which bonds had been redeemed by the state, and a registered bond, numbered 595, dated January 11th, 1866, issued instead of number 7742, and a coupon bond, dated January 1st, 1866, issued instead of number 4861; and which bonds, numbered 7742, and 4861, respectively, had been subsequently stolen from the treasury of

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the state, and had been afterwards purchased, *bona fide* for value, without notice of the theft, by the petitioners from one John B. Manning, a broker and member of the New York stock exchange.

Opinion states the case.

Pegram & Stringfellow, for petitioners.

Attorney-General, F. S. Blair, and *Judge E. C. Burks*, for respondents.

FAUNTLEROY, J., delivered the opinion of the court.

Upon the petition of John P. Branch and Fred. R. Scott, partners trading under the name of Thomas Branch & Co., representing that, on the 2d of June, 1879, they purchased from John B. Manning, a broker, and member of the New York stock exchange, a coupon bond of the state of Virginia, issued under an act passed by the general assembly, May 25th, 1852, dated August 4th, 1853, of the par value of \$1,000, and numbered 7742; and on the 24th day of June, 1879, they purchased from the same party another coupon bond of the par value of \$500, numbered 4861, and issued under an act passed March 2d, 1866, and dated January 1st, 1867, for which they paid the full market price; that both of said bonds are payable to bearer, and redeemable after the 1st day of January, 1887; that under the acts of February 14th, 1882, and November 29th, 1884, they are entitled to have said bonds, with the coupons attached, funded into or exchanged for bonds, or a bond and fractional certificates, as provided in said acts: that Morton Marye, first auditor of the state, F. G. Ruffin, second auditor, and Isaac R. Barksdale, treasurer, constitute the board of commissioners of the sinking fund, and are charged by law with the duty of issuing bonds and fractional certificates, under the aforesaid acts of February 14th, 1882, and November 29th,

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1884, and of exchanging the same for the bonds and coupons held by petitioners; that the petitioners presented their said bonds, and coupons attached, from January 1st, 1880, inclusive, to the said board of commissioners of the sinking fund, and demanded that they should fund or exchange the same, and issue to them the bond and fractional certificates to which they are entitled under the terms and provisions of the aforesaid acts of Feb'y 14th, 1882, and Nov'r 29th, 1884, which the said board refused to do, upon the ground that the said bonds were stolen; a rule was awarded by this court against the said Morton Marye, first auditor, Frank G. Ruffin, second auditor, and Isaac R. Barksdale, treasurer, constituting the board of commissioners of the sinking fund, to appear here on the 5th day of March, 1885, and show cause, if any they can, why the commonwealth's writ of *mandamus* should not be awarded the petitioners to command the said Morton Marye, first auditor, Frank G. Ruffin, second auditor, and Isaac R. Barksdale, treasurer, constituting the board of commissioners of the sinking fund, to issue to petitioners the bond and fractional certificates to which they allege themselves to be entitled under the said acts of February 14th, 1882, and November 29th, 1884, in manner and form, and for the amounts required by said acts, in exchange for their bonds and coupons aforesaid.

To this rule *nisi* the respondents make return, and demur to the petition and to the rule as insufficient in law, and answer, that they believe that the two bonds with the coupons attached referred to in the rule and filed with the petition, to-wit: bond No. 7742, for \$1,000, dated August 4th, 1853, and bond No. 4861, for \$500, dated January 1st, 1867, were duly issued by the commonwealth at their respective dates. That both of these bonds were, after being issued, duly redeemed by the commonwealth, by giving in exchange for them other bonds of the commonwealth, to-wit: a registered bond No. 595, dated January 11th, 1860, in lieu of bond No. 7742, and a coupon

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bond, dated January 1st, 1866, in lieu of bond No. 4861, as shown by duly attested copies of the records in the offices of the treasurer and second auditor, herewith filed as a part of this answer. The said bonds No. 7742 and No. 4861, were taken in by the state at the respective dates of redemption thereof, and filed by the treasurer for preservation in his office. Though noted on the records aforesaid, by marks of cancellation, as cancelled, yet, as it appears, no actual marks of cancellation were then impressed on the face of said bonds, and afterwards they were stolen or unlawfully abstracted from the office of the treasurer by some person or persons unknown to respondents; and in June, 1879, came into the hands of petitioners (Thomas Branch & Co.), who presented them, on the 17th day of August, 1882, to the then commissioners of the sinking fund, to be funded under the act of the general assembly (popularly known as the "Riddleberger Bill"), approved February 14th, 1882.

When the bonds were thus presented, it was discovered, from the records of the treasurer's office, after R. W. N. Noland, a clerk in the said office, had put marks of cancellation on said bonds and the coupons attached, that the said bonds had theretofore been redeemed as aforesaid, and noted on said records by marks as cancelled; and thereupon the then commissioners of the sinking fund refused to fund them. Afterwards, to-wit: on the day of , 1885, the petitioners (Thomas Branch & Co.) presented the said bonds, with the coupons attached, to respondents, then and now commissioners of the sinking fund, and asked that they be funded, under the act aforesaid of February 14th, 1882, and the act amendatory thereof, approved November 29th, 1884. Respondents, as commissioners aforesaid, refused to fund the said bonds and coupons, and they are advised that they properly so refused, and cannot be required by this honorable court to fund them.

First. Because the said bonds, with the coupons, having been stolen, or unlawfully abstracted from the custody of the state,

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after they had been redeemed and taken in as aforesaid, she is not liable for them to the petitioners, although they may be, as they claim to be, *bona fide* purchasers for value, without notice.

Secondly. Because even if the state be so liable, she has given no authority to respondents, either by the act aforesaid of February 14th, 1882, or any other act, to fund said bonds and coupons under the circumstances stated. To this return the relators demurred.

The relators claim that these bonds and coupons are negotiable instruments, having all the qualities of negotiable paper; and that they are *bona fide* holders thereof for valuable consideration, and had no notice of the theft at the time they acquired them: and that, as such, they are entitled to fund or exchange them under and according to the terms and intendment of the act of February 14th, 1882 (known as the "Riddleberger bill"), and the act of November 29th, 1884, amendatory thereof. The said bonds are not yet due, and this is not a suit for payment; yet the question at issue, to be decided by this court, is, whether the said bonds and coupons attached are the legal obligations of the state of Virginia? It is true, that they might be such, and yet not fundable under the act of February 14th, 1882, and the act amendatory thereof, of November 29th, 1884, if true, as contended by the respondents, that the said acts confer no authority upon them to fund these stolen bonds; they being not within the purview or comprehension and enumeration of the said acts; yet, undeniably and admittedly, if they be not the legal obligations of the state, they are not fundable under the acts aforesaid, and the respondents have properly refused so to fund them.

We are of opinion that, after these bonds with their appurtenances had been redeemed by the state, and taken into her possession and custody, they ceased to be her obligations; and could not again become such unless she voluntarily *redelivered* or *reissued* them. They had run their career, and fulfilled their mission, and had returned to the dusty depository of dead mat-

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ter in the treasury; and they had been substituted by outstanding equivalents which represent the legal and moral obligations of the state. They had no longer any legal inception or existence as the bonds of the state, and they were and are as though they never had been; and their vitality could never be restored without intentional and voluntary *redelivery* by the state:—certainly they could not be resurrected to the righteous judgment of a court of justice by robbery or theft!

In the case of *Burson v. Huntington*, 21 Michigan, 415 (decided in 1870), the court says: "The wrongful act of a thief or trespasser may deprive the *holder* of his property in a note which has once become a note, or property, by delivery; and may transfer the title to an innocent purchaser for value. But a note in the hands of the *maker*, before delivery, is not property, nor the subject of ownership as such:—it is, in law, but a blank piece of paper." And on page 431, "When a note payable to bearer, which has once become operative by delivery, has been lost or stolen from the *owner*, and has subsequently come to the hands of a *bona fide* holder for value, the latter may recover against the maker, and all indorsers on the paper when in the hands of the loser, and the loser must sustain the loss. In such a case there was a complete legal instrument; the maker is clearly liable to pay it to some one, and the question is only *to whom*. But in the case before us, where the note had never been delivered, and therefore had no legal inception or existence as a note, the question is whether he is liable to pay at all—even to an innocent holder for value." And again, on page 434, "When the maker or indorser has himself been deceived by the fraudulent acts or representations of the payee, or others, and thereby induced to deliver or part with the note, or indorsement, and the same is thus fraudulently obtained from him, he must, doubtless, as between him and an innocent holder for value, bear the consequences of his own credulity and want of caution. He has placed a confidence in another, and, by putting the paper into his hands, has enabled him to

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appear as the owner, and deceive others. Cases of this kind are numerous; but they have no bearing upon the wrongful taking from the maker, when he never voluntarily parted with the instrument. Much confusion, however, has arisen from the general language used in the books, and sometimes by judges, in reference to cases where the maker has voluntarily parted with the possession, though induced to do so by fraud: when it is laid down, as a general rule, that it is no defence for a maker, as against a *bona fide* holder, to show that the note was wrongfully or fraudulently obtained, without attempting to distinguish between cases where the maker has actually and voluntarily parted with the possession of the note, and those where he has not." In the case of *Hall v. Wilson*, 16 Barbour, 555, the court says, "It may be safely asserted, upon principle as well as authority, that the note [which had been stolen from the maker,] never had an inception so as to enable any person to become a *bona fide* holder of it. It was an imperfect instrument, wanting delivery to give it vitality as the promissory note of the defendant. The holder has taken but a blank piece of paper, not a promissory note."

In the case of *Baxendale v. Bennett*, 3 Law Reports (Queen's Bench Decisions), p. 525, (decided in 1878) *Bramwell, J.*, says: "It must be admitted that the cases of *Young v. Grote*, 4 Bingham, 253, and *Ingham v. Primrose*, 7 C. B. (N. S.) 82, go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument: it has not been got from him by the commission of a crime. This undoubtedly is a distinction, and a real distinction. The defendant here has not voluntarily put into anyone's hands the means, or part of the means, for committing a crime. But, it is said, that he has done so through negligence. I confess I think he has been negligent; that is to say, I think that if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so; but

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then this negligence is not the proximate or effective cause of the fraud; a crime was necessary for its completion. Then the *Bank of Ireland v. Evans' trustees*, (5 H. L. C. 389) shows under such circumstances there is no estoppel." In the same case, *Brett, J.*, says, "In this case I agree with the conclusion at which my brother Bramwell has arrived, but not with his reasons. * * * In this case it is true that the defendant, after writing his name across the stamped paper, sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover, the defendant would be liable; because he *sent it with the intention that it should be acted upon*; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance."

That there must be delivery of the paper, either actually or constructively, is clear. *First National Bank v. Strang*, 72 Ill. 559; *Burson v. Huntington*, 21 Mich. 415; *Baxendale v. Bennett*, 3 Law Reports (Queen's Bench Decisions) 525. Where a negotiable bill or note is stolen from the acceptor or maker, such party is not liable thereon to a *bona fide* endorser for value; even though the acceptor or maker somewhat facilitated the theft by putting the paper in an unlocked drawer in chambers, to which his clerk, laundress and other persons, had access. *Baxendale v. Bennett*, *supra*, and cases cited in Bigelow's Bills and Notes, 572-3.

Upon these authorities there could be no recovery upon the bonds and coupons held by the relators, if this were a suit for payment at or after maturity; and they cannot be funded, because they are not the legal outstanding obligations of the state of Virginia, having been redeemed and extinguished, and substituted by her equivalent bonds, as set forth in the return made by respondents to the rule *nisi*.

But it may be remarked here, that when these bonds were received by the relators from the New York broker, who received them from the unknown thief who abstracted them from

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the effete matter in custody of the treasurer of the state, the act of February 14th, 1882, and the act of 29th November, 1884, had not been passed, nor even conceived; and, therefore, even if they were just and legal obligations of the state, to be paid at maturity, the contract of the state was to pay money, not to give other bonds for them.

There is no hardship in this case. In 1879, when the relations, who lived in Richmond, the capital of the state, bought these stolen bonds, the legislative and newspaper reports were rife with suspicions and charges of frauds and thefts, and missing bonds of the state; and they were guilty of contributory negligence in that they did not inquire and inform themselves, as they could and ought to have done, by a breath, as to the genuineness of these bonds.

If it be proverbially true that the hand of innocence itself may not pluck a rose without a thorn, it certainly behooves the "*money changers*," who speculate in Virginia's financial complications, to inquire if they are dealing with the genuine obligations of the state, or with surreptitious securities.

We are of opinion that the respondents, "commissioners of the sinking fund," have made a good and sufficient return to the rule *nisi*; and that it must be discharged, and the peremptory writ prayed for denied.

Rule discharged, and the writ denied.

LACY, J., and RICHARDSON, J., concurred in the opinion of FAUNTLEROY, J.

HINTON, J., concurred in the results.

LEWIS, P., dissented.

WRIT DENIED.

Richmond.

CITIZENS BANK v. LAY.

APRIL 16TH, 1885.

1. **NEGOTIABLE INSTRUMENTS—Discharge.**—Payment of note at bank is either a sale or a discharge thereof. A sale, it cannot be without the bank's consent. And where the note is paid by a stranger bound for its payment at maturity, the note is thereby actually discharged, and cannot be re-issued by him so as to bind the parties thereto, or to keep alive a trust-deed executed to secure it, except with the knowledge and consent of those parties.
2. **QUÆRE.**—When may suit be brought on a dishonored note? As soon as it is dishonored, or after business hours on the day of its dishonor, or on the next day after its dishonor?
3. **NEGOTIABLE INSTRUMENTS—Discharge—Estoppel—Case at bar.**—C. purchased a lot and owed thereon \$2440, evidenced by his note secured by trust-deed on the lot. P. bought the lot of C., and, as part of the price, agreed to pay the note when due. When due, P. paid the note and took it up. It was not marked "paid," as P. told the note clerk he wanted to deposit it elsewhere as collateral. He did so deposit it with the Citizens Bank. Afterwards P. sold and conveyed the lot to L. The trust-deed had not been released, but P. told L. the note had been paid. Later, the bank had the lot advertised for sale to pay the note, and L. obtained an injunction.

HELD:

1. The transaction between P. and the bank at which the note was payable, discharged the note of C.
2. L. was entitled to rely on the statement of P. that the note had been paid, and was not estopped from denying its existence as a valid security, though P. might have been so estopped.
3. L. was a purchaser for value without notice, and it was proper to perpetuate the injunction in his favor.

Statement.

Appeal from two decrees of the chancery court of the city of Richmond, entered respectively, 18th January, 1883, and 28th June, 1883, in a suit wherein John F. Lay was plaintiff, and the Citizens Bank of Richmond and others were defendants.

Z. D. Pickrell, January 1st, 1876, purchased of R. B. Chaffin a lot in Richmond. Chaffin owed on the lot \$2440, evidenced by his note, which was secured by a trust-deed on the lot. Pickrell covenanted with Chaffin to pay this note as part of the price he was to pay for the lot. The note fell due July 19-21, 1877, and on the latter day, Pickrell, unable to meet it, borrowed \$2000 from the Merchants National Bank of Richmond, upon a promise to deposit the note as collateral security for the loan. With this sum and \$440 of his own money, he took Chaffin's note up out of the First National Bank of Richmond, where it had been deposited by the holder, Gilmour, and deposited it with the Merchants National Bank as collateral security for the \$2000. This was before three o'clock on the last day of grace. The note was not marked "paid," Pickrell telling the note clerk that he wanted to deposit it elsewhere as collateral. The Merchants National Bank held the note until August, 1877, when Pickrell, under an identical arrangement with the Citizens Bank of Richmond, borrowed \$2000 from the latter, took up the note from the Merchants National Bank and deposited it as collateral security. Pickrell, by payments, reduced the amount due thereon to \$969.82, at the time this suit was instituted.

In August, 1878, as the result of certain dealings between Pickrell and the appellee, John F. Lay, he executed to Lay a deed conveying the lot to the latter, who subsequently conveyed it to secure a debt to the Petersburg Saving and Insurance Company, also an appellee here. At this time the original deed of trust, securing the note of Chaffin on the lot, had not been released, but it was contended by Lay that Pickrell had informed him that the note had been paid, which contention

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was denied by Pickrell. In November, 1881, the Citizens Bank directed the trustee to sell the lot to pay the balance due upon the note. Upon advertisement, Lay brought his bill and obtained an injunction, upon the grounds that the transaction between Pickrell and the First National Bank operated as a payment of the note; that the lien on the lot was thereby discharged, and that he was a purchaser for value without notice. A final decree was entered in favor of Lay, and the injunction was perpetuated. From this decree the Citizens Bank appealed.

Sands, Leake & Carter, for appellant.

Pegram & Stringfellow and *A. R. Courtney*, for appellee.

LEWIS, P., delivered the opinion of the court.

We are of opinion that the decree is right, and must be affirmed. The transaction between Pickrell and the First National Bank, necessarily operated either as a sale or payment of the note in question. It was not the former, and must therefore have been the latter. It is essential to a sale that there be a seller on the one hand and a buyer on the other. Here there was neither. The note was deposited in bank by Gilmour, the owner, for collection only. He himself testifies that he "gave no authority to the bank, or to any of its officers, or to anyone else, to sell or transfer the note to anyone." It is equally certain that the bank did not undertake to sell or transfer it to Pickrell, whatever may have been *his* object in taking it up. It makes no difference that he declared his intention to the officials of the bank to deposit it as collateral elsewhere, and that at his request it was delivered to him uncanceled. The duty of the bank was discharged when it received the money and surrendered the note, and this was all that it did or intended

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to do. The payment by Pickrell was therefore a payment of a debt which he had covenanted to pay, and the note was thereby extinguished.

In *Lancey v. Clark*, 64 N. Y. 209, the defendant made his note for the accommodation of the firm of Lambert & Lincoln, for whom it was discounted. Before the note matured Lincoln wrote to the plaintiff to take up the note, and to furnish money for that purpose. The plaintiff sent the money to Lincoln, who placed it in bank to his individual credit, and on the day the note fell due took up the note with his individual check. He did not assume to act for the plaintiff, or ask to have the note transferred to anyone. He asked to have the note protested, so that he could hold the indorser and maker after protest. After he had thus paid and taken it, he sent it to the plaintiff. In an action on the note, it was held that the plaintiff did not take title from the bank, but from Lincoln, and subject to any defence against it in the hands of the latter; that the bank could not be made a seller without its knowledge or consent, and did not transfer the note, but only took payment, and that the plaintiff was not entitled to recover. The court said: "The plaintiff did not take title from the bank. It matters not that he furnished the money, and that Lincoln promised to use it in taking up the note for him. It matters not that the note was protested, so that the indorser and maker could be held, or that the bank did not intend absolutely to discharge and cancel the note. The question is, did the bank transfer or sell the note to the plaintiff? * * * All the bank did was to take payment of the note, and deliver it up to a party paying and liable to pay, after protesting it, so that he could make such use of it as the law and the facts would authorize. It did not transfer or intend to transfer it. The plaintiff, therefore, took no title to it from the bank, but he took it from Lincoln, and cannot therefore enforce it against the defendant."

The same principle was asserted in *Eastman v. Plumer*, 32 N.

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H. 238. In that case the defendant executed the note upon which the suit was brought as surety. At its maturity it was taken up by the principal debtor with money furnished for the purpose by the plaintiff. Whereupon, the note was surrendered, but the plaintiff was not known in the transaction by the holder to whom the money was paid. It was held that the note was satisfied, and that the action was not maintainable. To the same effect is the opinion of Judge Hughes, of the United States district court, in *Dooley v. V. F. & M. Ins. Co.*, 3 Hughes, 221. See also, 2 Danl. on Nego. Insts. sec. 1222.

In the light of these principles, the note in question when delivered to Pickrell was paid and satisfied. For although the maker of a promissory note payable at a bank has until the close of business hours on the day of its maturity in which to pay, yet payment may be demanded, and hence may be made, at any time after the commencement of business hours on that day. 2 Danl. on Nego. Insts. secs. 1210, 1235. The authorities, as counsel have said, are not agreed upon the point as to the precise time when suit may be brought on a dishonored note payable at a bank; some holding that it cannot be brought until the day after its dishonor, others that it may be brought at any time after the expiration of business hours on the day it is payable, and others still, that it may be commenced as soon as payment is refused on that day. But we do not perceive the analogy between any of these cases and the question before us. For whatever may be the rights of the maker in respect to a suit against him, undoubtedly he may pay at any time after payment is demandable, and such payment will operate as an extinguishment of the note. So here, when payment was made by Pickrell, the note was discharged, and could not thereafter be negotiated by him. He was not a party to the note, and in taking it up was only fulfilling his contract with the maker. It is certain the latter was discharged by the payment to the bank, and the law is well settled that after payment at maturity,

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a note cannot be re-issued, so as to charge any party thereto who otherwise would be discharged, unless with his knowledge or consent. Story on Bills, sec. 223; 2 Danl. on Nego. Ists. sec. 1233; *Burbridge v. Manners*, 3 Camp. 193; *Gardner v. Maynard*, 7 Allen, (Mass.) 456.

But if it were conceded that the note was transferred by the bank to Pickrell, and that having been deposited with the Merchants National Bank before 3 o'clock P. M. on the day of its maturity, the latter bank acquired a complete title thereto, the result would be the same. For, when afterwards surrendered to Pickrell, the note was long past due, and the Citizens Bank, the appellant here, acquired the note, not from the Merchants National Bank, but from Pickrell, and therefore took it with all its infirmities. Now, inasmuch as Pickrell, by his covenant with Chaffin had bound himself to pay the note when due, it is plain that in an action on the note there could have been no recovery by Pickrell against Chaffin; and if the note as to Chaffin was paid, the trust-deed executed by the latter to secure its payment was in effect discharged.

It is insisted, however, that Pickrell having delivered the note to the Citizens Bank as a valid, subsisting security, his alienee, Lay, is estopped from denying that it was. But we cannot concur in this view. The vitality of the note in Pickrell's hands was gone, and could not be restored without Chaffin's consent; and whatever may have been the effect of the former's representations upon *him*, it is clear that the alleged estoppel cannot operate as against Lay. The latter was a purchaser for valuable consideration of the lot upon which the trust-deed had been executed, and testifies that at the time of the purchase he was informed by Pickrell that the note had been paid. This Pickrell denies, but the circumstances of the case tend to sustain the statements of Lay. It is not shown that Lay had notice of any representations by Pickrell to the Citizens Bank, or of the fact that the note secured by the trust-

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deed had been passed to the bank; and although the lien of that deed had not been formally released on the record, yet he had the right to rely on Pickrell's representations to him that the note had been paid. He was, therefore, a purchaser without notice of, and consequently is not bound by, any estoppel *in pais* resting on his vendor, Pickrell. See Bigelow on Estoppel (3d ed.), 378.

DECREE AFFIRMED.

Richmond.

KEMP v. THE COMMONWEALTH.

APRIL 16TH, 1885.

1. CRIMINAL JURISDICTION AND PROCEEDINGS—*Aiding and abetting*.—It is well-settled law that mere presence is not sufficient to render one guilty of aiding and abetting the commission of crime. There must be something done or said by him showing his consent to the felonious purpose and contributing to its execution. *Lee Reynolds v. Com'th*, 33 Gratt. 834.
2. *IDEM*—*Case at bar*.—The circumstances indicate that though W. did kill the deceased, and that K. was present, yet the latter did not aid or abet in the commission of the crime.

Error to a judgment of the corporation court of the city of Norfolk, rendered against William A. Kemp, whereby he was sentenced to imprisonment in the state penitentiary for the period of five years for the murder in the second degree of one Junius A. Rogers.

The indictment was against Charles L. Whitehurst, William A. Kemp and James T. Guy, jointly, charging the first with murder in the first degree, and the other two with being present, counseling, aiding, abetting and assisting the said Whitehurst in the commission of the crime. The prisoners elected to be tried separately. See *Whitehurst's case*, 79 Va. 556.

Kemp moved for a new trial on the ground that the verdict was contrary to the law and the evidence and that the court misdirected the jury. The court overruled the motion, and the pris-

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oner obtained from one of the judges of this court a writ of error and *supersedeas* to the judgment.

Opinion states the case.

John Goode and Parker & Allen, for prisoner.

Attorney-General, F. S. Blair, for the commonwealth.

RICHARDSON, J., delivered the opinion of the court.

On the 4th day of February, 1884, a special grand jury for the city of Norfolk found an indictment against Charles L. Whitehurst, James T. Guy, and the plaintiff in error, William A. Kemp, for the murder of Junius A. Rogers, on the 20th day of January, 1884.

The indictment contains three counts, in each of which it is charged that the said Charles L. Whitehurst inflicted the mortal wound, and that the said James T. Guy and the plaintiff in error, the said William A. Kemp, were present, counseling, aiding, abetting, and assisting the said Charles L. Whitehurst in the commission of the said murder. On the said indictment Whitehurst was, in the corporation court for the city of Norfolk, duly tried, convicted of murder in the second degree, and sentenced to confinement in the penitentiary for the term of twelve years, that being the period found by the jury which tried the case; which finding and sentence was subsequently, on writ of error, affirmed by this court. See *Whitehurst v. Commonwealth*, 79 Va. 556. Subsequently, to wit: on the 28th day of November, 1884, the plaintiff in error was, in said corporation court, separately tried, found by the jury guilty of murder in the second degree, the term of his imprisonment in the penitentiary fixed at five years, and was sentenced accordingly by said court. On a writ of error, awarded by one of the judges of this court, the case is here for review.

Upon the rendition of the verdict, the prisoner, by his coun-

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sel, moved the court to set aside the verdict, upon the grounds, (1) that the verdict was contrary to the law and the evidence, and (2) because of misdirection.

By two bills of exception, taken by the prisoner at the trial, the case is made fully to appear.

The first bill of exceptions is to the judgment of the court overruling the prisoner's motion to set aside the verdict and grant him a new trial. This bill of exceptions sets out all the evidence in the cause, as certified by the trial court, and will be first considered. There is really no conflict of evidence, and therefore it may be considered, practically, a certificate of facts proved.

There is really no material fact touching the conduct of the plaintiff in error on the occasion of the homicide in question, that is not minutely detailed in the evidence of Henry B. Reardon, the principal witness for the commonwealth; nor is there anything in all the evidence in conflict with his statement in any material particular, though the statements of other witnesses are, in some respects, much fuller. The substance of Reardon's statement is, that on the night of the 19th day of January, 1884, he and the deceased, Rogers, had been together playing pool and drinking beer, from about eight or nine o'clock until about twelve o'clock; that neither Rogers nor himself were affected by the beer they had drank, witness having taken some eight glasses; that they that night, later, visited several places, among them a house of ill-fame in said city, kept by Maud Earl, where they remained half-hour or more, when Rogers left, ahead of Reardon, and started down the street. and then Reardon went out, overtook Rogers, and went with him to another house of ill-fame, kept by Nannie Gale, on Cove street, where Rogers had an engagement to stay all night, and at or near the front door of this house, they found several persons, one of them being Wm. A. Kemp, the plaintiff in error here.

Just here let us drop, for the time being, Reardon's statement, to be resumed after tracing the party of which Kemp

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was one, to the same place, the house of Nannie Gale, in the back yard of which the unfortunate homicide occurred.

J. T. Murden, another witness for the commonwealth, says: "About 12 o'clock, Saturday night, January 19th, 1884, Kemp and I went to a barber shop, got shaved, and went to Nebeling's saloon, on Church street, to get a sandwich. While there we met Charles Whitehurst, the three Winslow boys, and James T. Guy. I drank with Guy. After awhile it was proposed to go down town. We went down Church street in twos, until near Cove street, where it crosses Church street, when some one in the crowd said, 'turn to the left.' We went down Cove street toward Fenchurch, until we got to No. 121, where Nannie Gale keeps. When we got to Nannie Gale's, Charles L. Whitehurst went up in the porch and rang the door-bell. Some one responded, but I don't know what was said. Just then two men" (Reardon and Rogers) "came across the street and went up in the porch. They soon came down and went in the lane. They were followed by Charles Whitehurst, Kemp, Guy, and one of the three Winslow boys. I stood outside talking to one of the Winslows, and his brother, who had just gone up the lane, came back, when he and his brothers went home, at least they left, saying they were going home. Winslow was only in the lane a minute or so. Soon after Winslow came out, Guy came out, and said, 'I have received a hell of a blow in the eye.' I asked Guy who struck him? He said Rogers. I asked him what for? He said he did not know. After talking about it for a few minutes, Guy said to me, come, let's go up and see what they are doing. I said, I won't do it, if there is going to be a row. Guy started up the lane, and when he had got a few feet up the lane, Charles Whitehurst came out in a great hurry, Kemp close behind him, and Guy immediately behind Kemp. I don't think Guy could have gotten more than one-third of the way up the lane before he met Whitehurst and Kemp coming out. Whitehurst came out hurriedly, Kemp following him. When they got to the head of the lane, heard Whitehurst say,

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‘I hit that fellow a hell of a blow with an axe.’ Whitehurst and Kemp then started up Cove street, and Guy and I followed them. When we overtook them on Fenchurch street, I said to Kemp, ‘why don’t you go back and get your hat?’ Whitehurst said, ‘Murden, you don’t know anything; I hit that man a hell of a crack on the head with an axe.’ We then went on, Kemp and Whitehurst in front, until we got to the corner of Fenchurch and Charlotte streets, when I said to Whitehurst, ‘Charlie, you did not hit that man with an axe sure enough?’ Whitehurst said, ‘yes, I did.’ I said, ‘did you hit him hard?’ He said, ‘to tell you the truth, I was so mad and excited, I don’t know how hard I hit him, but I expect I cracked his skull.’”

Now let us resume Reardon’s statement where we left it off on his arrival at the house of Nannie Gale, in company with Rogers. Reardon does not state whether, when he and Rogers arrived in front of Nannie Gale’s house, where they found the other party, that any recognition passed, or that a word was spoken by any one of either party. From his statement, it appears that Whitehurst, one of the party found there, was in the porch. Reardon and Rogers went into the porch, and Rogers either rang the bell or knocked, but failing to get in they came down from the porch and went up the lane to the back door, Rogers ahead, and Reardon next, followed by Whitehurst, Guy and Kemp, and so Reardon thought, by a fourth one, part of the way up the lane. This was, doubtless, one of the Winslow boys, who went only a part of the way up the lane, as explained by the testimony of the witness, Murden. In the order named, these five persons entered the back yard to the house of Nannie Gale, and then into a narrow, dark alley or passage way between the kitchen and back door of said house, and some thirty feet long. Here, Reardon says: “When we reached the narrow passage way leading to the back door, Rogers said to the parties, ‘You are not going in here; you did not come with us and you are not going in with us.’ after

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some *other words*, blows commenced near the back door. When the fuss began Rogers was on the steps. I saw all three men (Kemp, Guy and Whitehurst) strike out at Rogers, but cannot say if they hit him or not. I took no part in the scuffle in the passage way; was not struck, nor did I strike anyone. When we got back in the yard—Kemp, Guy and Whitehurst getting into the yard first—I became immediately engaged in fight with Kemp. While thus engaged with Kemp, I saw Rogers, who stood near the end of the kitchen, apparently in a dazed condition. I felt surprised that Rogers did not come to my rescue, for I knew that he would fight. At the time I saw a man with uplifted arm, I heard a thud and Rogers fell, and immediately the man ran. I called for assistance, and Rogers was carried into the house. I did not think he was much hurt. I left him in charge of the inmates of the house, telling them if Rogers needed a physician to send for one. I was not armed during the time, nor do I know that Rogers was. He was not in the habit of carrying a weapon. I saw no weapon that he had.” Reardon further testified that Kemp followed next to him and Rogers going up the lane; that Kemp, when the fight began, (that is, in the back yard) first struck him, and he struck back; that Kemp could not have struck the blow that felled Rogers; that at that time he (Reardon) and Kemp were clinched, and that it was at that time he saw the hand uplifted; and that he did not recognize the man, nor see what was in his hand; he (Reardon) was next to the man who struck Rogers; that the man stood about four feet from him; that he saw but two men in the back yard when Rogers received the blow; and that it was very dark in the back yard, there was no light from the windows, the night was dark and hazy, and there was no moon; that Rogers was a strong man, pretty good fighter, and a practiced athlete—a brave, game man—that he knew of no animosity between Rogers and any of the parties; and that during the fight between him (Reardon) and Kemp, nothing was said by Kemp to anyone, nor by anyone to

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Kemp; that they (Reardon and Kemp) had about all they could do to attend to each other.

Angelina Johnson, a colored witness, who lived near by, says: "I was sitting up before the fire sleep. I awoke, heard the noise, and went to the door and listened. I saw a man with a long ulster on running out of the lane, and he said, 'I have downed both of the sons of bitches. I know them both.' I did not hear the first of it. One of them said, 'Who are you, anyhow? Who are you? You son of a bitch, you are not going in here with us.'" This obviously explains the "other words" spoken by Rogers at or near Nannie Gale's back door, referred to by Reardon, but not given by him. It is, moreover, obvious, from all the testimony, that the person this witness saw running out of the lane, and who she heard say, "I have downed both the sons of bitches—I know them both," &c., was Whitehurst; though it is evident that this witness' account of what Whitehurst said, does not agree with the statements made by Whitehurst immediately afterwards in the presence of Murden, who was on the street, where he had remained, in front of the house of Nannie Gale; and it being clear that Whitehurst did not "down" but one person. Whether, in this respect, this colored witness was mistaken, is not material, nor is it necessary to notice further her statement, as it in no wise even tends to inculcate Kemp.

Witnesses were introduced on behalf of the accused, but it is not necessary to refer to their testimony further than to say, nothing was disclosed to the prejudice of the accused.

On this testimony the jury found the accused guilty of murder in the second degree, and ascertained the term of his imprisonment in the penitentiary at five years; and sentence was pronounced accordingly. Upon a writ of error to that judgment the case is here for review.

The principles of law bearing upon this case are plain and easily applied. The plaintiff in error was indicted, tried, and convicted for being present, aiding and abetting in the murder

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of the deceased, the indictment alleging that the mortal blow was struck by Charles L. Whitehurst.

The well settled doctrine is, that a mere presence is not sufficient; nor is it alone sufficient, in addition, that the person present, unknown to the person who strikes the mortal blow, mentally approves what is done. There must be something going a little further; as, for example, some word or act. The party to be charged, "must," in the language of Cockburn, C. J., in *The Queen v. Taylor*, C. C. R. 147, "incite, or procure, or encourage the act." See, also, 1 Bish. Cr. Law, § 683, and numerous authorities there cited. Hence, in *State v. Hildrette*, 9 N. C. 440, it was held to be necessary, in order to make one an aider or abettor, that he should do or say something, showing his consent to the felonious purpose, and contributing to its execution.

Mr. Bishop says, that "from the proposition that mere presence at the commission of a crime does not render a person guilty, it results, that, if two or more are lawfully together, and one does a criminal thing without the concurrence of the others, they are not thereby involved in guilt. But, however lawful the original coming together, the after conduct may satisfy a jury that all are guilty of what is done." 1 Bish. Crim. Law, § 634. And the same learned author says: "Even when persons are unlawfully together, and by concurrent understanding are in the actual perpetration of some crime, if one of them, of his sole volition, and not in pursuance of the main purpose, does a criminal thing in no way connected with what was mutually contemplated, he only is liable." "Thus," says the author, "if in England, poachers join in an attack on the game-keeper, and leave him senseless,—then, if one of them returns and steals his money, this one alone can be convicted of the robbery. So, if two have committed a larceny together, and one suddenly wounds an officer attempting to arrest both, the other one cannot be convicted of this wounding, unless the two had conspired, not only to steal, but to resist also, with ex-

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treme violence, any who might attempt to apprehend them. The doctrine has been carried so far as to hold, that, where two join in an assault, and one commits *mayhem*, the other is not liable for the latter offence, unless he also intended to maim. But the correctness of this latter doctrine has been doubted, and, we think, properly." It is, however, in this case wholly unnecessary to push the doctrine to any extreme, or even beyond the proposition first stated, that "mere presence is not sufficient."

There is no room to doubt that the court below erred in refusing to set aside the verdict and grant a new trial. Indeed, the finding of the jury is so plainly unwarranted by any fact or circumstance disclosed by the evidence, that the court, unasked, ought, of its own motion, to have set aside the verdict, and ordered a new trial. As was said by Moncure, P., in *Reynolds' case*, 33 Gratt. 884, "the facts are so insufficient to sustain the verdict that, upon a demurrer to evidence, judgment ought to have been given in favor of the demurrant." There was in that case much more room for a verdict against the accused than there is in this. In that case, two persons were indicted jointly for murder, the fatal blow having been struck by one. The persons indicted were brothers, Burwell Reynolds and Lee Reynolds, who were members of a colored school near where the killing occurred. There was ill-feeling—a feud, so to speak—between the Reynoldses and the family of the deceased, growing out of the ducking of a younger brother of the deceased by the children of this school, for hallooing "school butter," in which ducking one of the brothers (Burwell Reynolds) took an active part. Altercations had subsequently occurred between the deceased and the Reynolds boys. There was evidence of threats *pro* and *con*, and the evidence was conflicting. The parties met near the place of the school, and deceased got into a difficulty with Lee Reynolds, the deceased commencing it, and during it Burwell Reynolds came up and gave the deceased a mortal stab with a knife. The evidence

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was conflicting as to how the difficulty commenced. Lee Reynolds was tried separately, found guilty of murder in the second degree, and sentenced accordingly. In delivering the unanimous opinion of this court, reversing the judgment below, Moncure, P. said: "The prisoner certainly did not kill the deceased; nor do the facts certified show, or even tend to show, that he assisted in any way, or to any extent, in the said killing, nor to the act by which it was done, nor to its being done by any other act or any other person."

It is impossible in this case, to read the evidence, and fail to see that this language of Judge Moncure applies with greatly enhanced force here. In all the evidence in this case (and there is no conflict of evidence in any respect) there is not a circumstance disclosed tending in the least to show any agreement or formed design between the prisoner, Kemp, and the man, Whitehurst, who did the killing; nor between him and any other person or persons, nor that he in any manner aided or abetted in or assented to, the felonious act of Whitehurst, the sole perpetrator thereof: nor was there a moment of time in which there could have been an agreement between the real perpetrator and the prisoner. Nor is there an intimation of any agreement or design on the part of the prisoner to commit any other unlawful purpose. The testimony establishes nothing except the mere presence.

The meeting of the parties who were present at this tragedy was purely accidental. The party of which the prisoner, Kemp, was one got to the house of Nannie Gale, rang the door-bell, and while apparently waiting for admittance, the deceased, Rogers, and his companion, Reardon, arrived, sought admittance by the same means, and failing, came down from the porch, went up the lane into the back yard, through a narrow dark passage way, some thirty feet long, to the back door of Nannie Gale's house, followed by Whitehurst, Kemp and Guy. It seems that up to this time not a word had passed there. Rogers seems to have turned upon the other party with the

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coarsely insulting language: "You are not coming in here. You did not come with us, and you are not going in with us. Who are you, anyhow; who are you, you son of a bitch?" Here, too, as we must infer, Rogers struck Guy, in the language of the latter, as detailed by Murden, "a hell of a blow in the eye." Certain it is, that after a very brief absence Guy returned to the street where Murden had remained and told him about the blow he had received from Rogers; that Guy did not rejoin Whitehurst and Kemp during the fray, and that only Rogers, and Reardon, and Whitehurst, and Kemp were present when the killing occurred. It is also clear that, after getting back into the yard, the mortal blow was struck by Whitehurst with an axe belonging to Nannie Gale, and, during the fray accidentally found by the kitchen, where it had been left by the hired cook of Nannie Gale the previous evening; and that the prisoner had no knowledge that the axe was there, no knowledge of the murderous use of such an instrument by Whitehurst until after the fatal blow was struck, and in no way aided in or assented to its use.

It is important to observe, before leaving Reardon's statement, that in certain important particulars, it smacks too much of the incredible to be made the basis of safe judicial determination. He describes the night on which the killing occurred as a very dark, hazy night, and that there was no moon; and he says there was no light reflected from the windows. He, moreover, says that the passage-way between the kitchen and back door, at or near which the difficulty begun, was dark and narrow, being some thirty feet in length; yet, telling of the language used by Rogers to Whitehurst, Kemp and Guy, but omitting all mention of a blow given by Rogers to Guy, states that in that dark narrow passage-way he saw Whitehurst, Kemp and Guy each strike out at Rogers, but does not know that they hit him. Again, Reardon and Rogers were abreast of Whitehurst, Kemp and Guy, in that passage-way. How did they get out into the back yard? We can understand that Guy left imme-

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diately on receiving the blow in the eye from Rogers; but this does not account for Reardon and Rogers getting back there. Reardon is the principal witness for the commonwealth. He does not pretend that Whitehurst and Kemp got by them in the passage-way and forced them out. Again, Reardon says when he got out at the end of the passage-way, Kemp struck him the first blow; that he and Kemp became immediately engaged in fight, and while thus clinched, and having as much as they could do to attend to each other, he, Reardon, saw Rogers a few feet distant and near the kitchen, there being a man near Rogers with uplifted hand; that he, Reardon, did not see what was held in the hand thus uplifted, nor did he see the hand descend, but in a moment heard a blow, a *thud*, and Rogers fell; that he had him taken into the house, and did not think he was much hurt. How Reardon could have seen these things in such darkness, and in such a situation as he describes, is past comprehension. The circumstances strongly tend to show that Rogers and Reardon turned upon Kemp and Whitehurst (after Guy had received the blow from Rogers, and retired), and forced them back into the back yard, where Whitehurst, who was doubtless being pursued by Rogers, found the axe, and with it struck the mortal blow. What the peculiar circumstances were under which he struck that blow, is something not explained. It is, however, indisputably established by the repeated statements of Whitehurst himself, to and in the hearing of several persons, that he did strike the fatal blow; and doubtless, but for the peculiar circumstances narrated, the offence thus committed would have been elevated to murder in the first degree. This is all the more plain in view of the fact that next morning, when light came, a pistol, as well as the axe, was found in the back yard. It is not proved who owned or had that pistol at the time of the killing. However, the enquiry most naturally forces itself upon the mind, was that pistol in the hand of Rogers when he received the blow that killed him? As to this there was no proof; had the matter been explained, it might most materially have

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changed the result as to Whitehurst. However that may have been, there is absolutely no evidence, no circumstance, tending to criminate Kemp, as aiding or abetting, or in any way assenting to the crime, which was committed solely by Whitehurst. It is proper to say, however, that the evidence clearly discloses the fact that the unfortunate death of Rogers was the result, to some extent, of his own recklessness and folly, prompted, it is sad to say, so far as disclosed by the evidence, by no other or higher motive than a question of precedence in respect to admission to a bawdy-house.

The only other question raised by the record is as to certain instructions asked for by the prisoner and refused, and other instructions given by the court in lieu thereof. These are set forth in the prisoner's second bill of exceptions; but in view of the conclusion arrived at and above expressed, in respect to the question raised by the prisoner's bill of exceptions No. 1, it is unnecessary to pass upon the ruling of the court in respect to said instructions.

For the reasons above, the judgment of said corporation court must be reversed and annulled, the verdict of the jury set aside, and the case remanded to said corporation court for a new trial to be had therein in accordance with the foregoing reasons.

JUDGMENT REVERSED.

Richmond.

GARNETT v. LOVEN AND ALS.

APRIL 16TH, 1885.

EQUITABLE JURISDICTION AND RELIEF—*Case at bar.*—Under decree in creditor's bill filed in 1870, the debtor's real estate was sold in parcels. To G. and to L. each, a distinct parcel was sold and conveyed by defined bounds. The suit was dismissed in 1876. Four years afterwards, L. having got possession of thirty-two acres of the parcel conveyed to G., the latter brought unlawful detainer to recover it; and L., without the said suit having been restored to the docket, filed therein against G. his petition, and obtained an injunction restraining proceedings under the unlawful detainer, on the ground that a mistake had been made in the conveyance to him, whereby said thirty-two acres had been omitted from his, L.'s, boundary. G. objected to the filing of the petition, demurred to it, and answered it, denying all fraud, and that L. had got all the land he had bought, and the contrary thereof was not established by L., but the circuit court overruled the objection and demurrer, and decreed that G. should convey to L. the said thirty-two acres. On appeal,

HELD:

1. The objection to the filing of the petition in the cause which had been dismissed, should have been sustained.
2. The demurrer to the petition as an original bill, should have been sustained, as it was without equity, there being no privity between L. and G.
3. If L. had any remedy, it was at law, against the commissioners who made the sale and conveyance to him; or in chancery, against the creditors of M., who participated in the proceeds of the sales of his lands.
4. Upon the merits, L. had no case, as he did not show that he had not received, apart from the thirty-two acres, as much land as he had bought.

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Appeal from circuit court of Caroline county. Opinion states the case.

E. C. Moncure and *John S. Wise*, for the appellant.

W. T. Chandler and *J. M. Hudgin*, for the appellees.

FAUNTLEROY, J., delivered the opinion of the court.

This is an appeal from two decrees of the circuit court of Caroline county, rendered, the one September 10th, 1880, and the other September 14th, 1882, in a chancery proceeding brought in the said court by George Loven against R. B. Garnett and others.

In 1870, certain creditors of T. C. Martin, then deceased, filed their bill against the heirs of the said Martin, to enforce their claims against the real estate of said Martin, consisting of a farm of some eight hundred or more acres of land, lying partly in Caroline county, and partly in King and Queen county. The said real estate of said T. C. Martin, deceased, had been surveyed and divided off into parcels, and partitioned among the children and heirs of the said Martin; and a decree was entered in the suit of Wright and others against Martin's administrator and others, on the 14th of April, 1873, confirming the report of the master commissioner ascertaining the estate and the debts of the deceased, and directing a sale to be made, by commissioners appointed for the purpose, of the said real estate of the said T. C. Martin, deceased.

In execution of said decree, the commissioners of sale, R. O. Peatross and J. M. Hudgin, proceeded to offer to sell at public auction, on the premises, May 24th, 1873, the real estate in the bill and proceedings mentioned, upon the terms provided in said decree: and, in accordance with the wishes of bidders, and that they might the more readily effect sales, they offered the property in lots or parcels, and did, thereby, sell the said land

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in detail to sundry and independent bidders: which said sales they reported duly to the circuit court of Caroline, and they were approved and confirmed by the said court; and deeds were executed and delivered by the said commissioners to the said several purchasers of the several and separate parcels of land.

On the 9th day of August, 1875, the said commissioners executed and delivered their deed to R. B. Garnett, in which they recite that "whereas the said R. B. Garnett (who was one of the purchasers at the sale aforesaid) has paid the said commissioners in full for two hundred and eighty and one-half acres, the receipt whereof is hereby acknowledged, before the signing and delivery of this deed; now, therefore, this deed between the said parties, witnesseth that the parties of the first part do hereby grant and convey, with special warranty, unto the party of the second part, all that tract or parcel of land situated in the county of King and Queen, and lying east of the creek below the mill-dam (of Martin's mill) to a point on said creek at which it intersects with that portion of the land allotted to A. M. Handley; and thence, etc., to the starting point—the mill-dam—containing in all two hundred and eighty and one-half acres, *be the same more or less.*" The said commissioners of sale made their deed on the 9th day of August, 1875, to George Loven, who had purchased at the aforesaid sale, and subsequently, several pieces or parcels of said real estate, in which they recite, that for and in consideration of the sum of fifteen hundred and ten dollars, with interest, paid by the said George Loven to said commissioners, the said parties of the first part hereby grant, sell and convey with special warranty, all their right, title and interest in and to the said three several tracts or parcels of land (including "Martin's mill") aggregating one hundred and eighty-seven acres, *be the same more or less*; said land is situated on both sides of the main road leading from Central Point to New Town, and *west* of the mill-pond and creek, and adjoining the land of Willis Pitts and others, it being

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that portion of Thomas C. Martin's estate lying in Caroline county." At the May term, 1876, of the circuit court of Caroline, this suit of *Wright and others v. Martin's administrator and others* was finally disposed of by the following order entered in the cause: "And it further appearing to the court that the costs have all been paid, and the object of the suit obtained, that the same be dismissed."

In February 1880, without any motion, suggestion or order, for reviving or reinstating the aforesaid cause of *Wright, &c., v. Martin's administrator and others* (a creditor's bill, which had been ended, dismissed, and stricken from the docket nearly four years before,) George Loven filed his petition in the said cause, praying for an injunction to restrain the said R. B. Garnett from recovering a portion of the land purchased by the said Garnett at the said sale, made as aforesaid, under the proceedings in the said creditor's suit, and for which he had fully paid and obtained and recorded his deed as aforesaid, upon the ground that there was a mistake in his deed, and on the 7th day of February, 1880, an injunction was awarded, to restrain "R. B. Garnett, his agents and attorneys, and all others, from further proceeding in and under a case of unlawful detainer, brought by him against the petitioner, George Loven, in the county court of King & Queen county, until the further order of the circuit court of Caroline."

To the filing of this petition by the said George Loven, the said R. B. Garnett demurred; and he demurred to the said petition and answered. On the 10th day of September, 1880, the cause coming on to be heard upon the said petition, and the demurrer and answer thereto, the court overruled the said demurrer, and treated the petition as an original bill.

On the 14th day of September, 1882, the cause came on for final hearing, upon the papers formerly read in the cause, and upon depositions taken and filed in the papers of the cause; whereupon, the court decreed, that "Reuben B. Garnett make

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a deed, with special warranty, conveying to George Loven the thirty-two and one-half acres of land lying south of the Mill creek, in King & Queen county, Virginia; which land was, through mistake, conveyed to R. B. Garnett by Commissioners Hudgin and Peatross, *in this cause*."

We are of opinion that the circuit court of Caroline erred in overruling the demurrer to the petition, and in treating it as an original bill. It should have been dismissed, for want of equity upon its face. R. B. Garnett was a purchaser of a distinct and separate, and well defined piece or parcel of land, sold by commissioners of the circuit court under decrees rendered in the suit of *Wright & others v. Martin, &c.*, which had been ended and dismissed for four years; and the petitioner, George Loven, had no privity or relation, or cause of action against the said R. B. Garnett whatever in that suit, or any equity arising from any proceedings had therein. If he had any whatever, it was against the commissioners of sale in the ended and dismissed chancery suit of *Wright, &c. v. Martin, &c.* If he had cause of complaint, his redress was at law against Hudgin and Peatross, commissioners of sale; or in equity, against the creditors of Thomas C. Martin, who had participated in the proceeds of the sale of the said land. The petition and statements in evidence of George Loven, show that the defendant, R. B. Garnett, has, at the least, equal equities in the land in question, and has secured the legal title, by a good and approved and recorded deed from the circuit court; and there is neither fraud nor mistake shown, as between the parties, such as a court of equity should correct, in this proceeding. *Vide, Lea's ex'or v. Eidson*, 9 Gratt. 277; *Zost v. Mallecote's adm'r*, 77 Va. 610.

In the case at bar, if Garnett has more land within the boundaries of his deed than he has paid for, he should pay for the excess; but the court cannot rescind his contract. Loven is not entitled to receive even the payment for the excess, if any such there be; for he has failed to show that he has not

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the full number of acres purchased by him in a different county and on the opposite side of a creek which is a boundary line between two counties, and expressly defined and fixed as the boundary of his land in his deed, and as the boundary of R. B. Garnett's land in his deed—both from the same commissioners of sale. And it is shown by the record, that the said commissioners, J. M. Hudgin and R. O. Peatross, are not parties to this petition, or the proceedings under it; no process has been awarded against them, and they have not answered.

But the evidence does not justify or warrant the decree of September 14th, 1882. There is nothing in the record to show that there is any mistake or deficiency in the quantity of land called for in Loven's deed; he says in his own testimony that he has never had it surveyed; and that he does not know but that he has the full complement called for by his deed on the north or west side of the creek—187 acres. His deed expressly defines that his purchases lay *on the west side of the creek, and in Caroline county*; and the record shows that he not only did not buy any land on the east, or King & Queen side of the creek; but that he expressly said that he did not wish to buy any on that side; and urged R. B. Garnett to buy it all up to the creek on that side.

The evidence shows that when Garnett bought the strip of 32½ acres of land in question, it was overflowed, and was a quagmire, which could not be drained, except (as was done by Garnett's inducement with his brother and nephew, who owned the land adjoining below on the same side of the creek,) by costly and extensive ditching and draining of the land below, to render even possible the ditching and draining of this piece above. The answer denies all fraud or deception by Garnett in negotiating for the said slip of land, partly under water and overgrown with swamp bushes to such an extent that it was mere conjecture and guess as to the number of acres it might be.

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The decrees of the circuit court complained of are erroneous and must be reversed and annulled. And this court, proceeding to render such decree as the circuit court of Caroline ought to have rendered, it is ordered, that the petition filed and treated as an original bill in this cause be dismissed, with costs to the defendant in the court below; and that the injunction awarded upon the said petition be dissolved, with costs.

DECREE REVERSED.

Richmond.

MATTHEWS v. JENKINS.

APRIL 16TH, 1885.

1. PRACTICE IN CHANCERY—*Demurrer*.—It is settled in this state that a demurrer in the form prescribed by the statute, and assigning no grounds, inserted in the answer is sufficient. Code 1873, chapter 167, section 31; *Dunn v. Dunn*, 26 Gratt. 291. And when the court has adjudicated the principles of the cause in favor of the plaintiff, the presumption is that it overruled the demurrer, though the record does not show what was done with it. *Hinchman v. Ballard*, 7 W. Va. 171.

2. CONTRACTS—*Descriptio personæ*—*Case at bar*.—In body of contract, M. is described as "Secretary of the M. E. Association," but he signs it in his own name without addition, and all the words of promise in the contract are his.

HELD:

It is the personal undertaking of M. and not the contract of the association.

3. *IDEM*—*Year's service*—*Monthly salary*.—A contract to continue for the period of a year, with salary payable monthly, does not make it incumbent on the employee to aver and prove that he performed the entire year's service, or was prevented from performing it, by the employer, as a condition precedent to the former's recovering anything. If the whole is to be done on one side, before anything is done on the other, then the promises are dependent. But if something is to be done on the one side, before the whole is to be done on the other, then the promises are independent.

Appeal from decree of circuit court of Fauquier county, pronounced 14th April, 1883, in the chancery suit of S. T. Jenkins, plaintiff, against T. W. Matthews, defendant.

The defendant was a non-resident of this state, but owned real estate in said county, and the plaintiff sued out an attachment in equity, and had it levied on the said real estate; and the court below decreed that the defendant pay to the plaintiff the sum of \$556.50, with interest thereon from the 2nd June, 1882, until paid, and his costs, and in default of such payment that the said real estate be sold. From this decree Matthews obtained an appeal and *supersedeas* from one of the judges of this court.

Opinion states the case.

A. D. Payne, for the appellant.

Hunton & Son, for the appellee.

HINTON, J., delivered the opinion of the court.

This was an attachment in equity, brought to recover of the appellant, who is a non-resident, a balance of salary claimed to be due the appellee for services under the provisions of the agreement following:

An agreement entered into between T. W. Matthews, secretary of the Mutual Endowment Association of Baltimore, Md., and S. T. Jenkins, of Atlanta, Ga. The said Matthews agrees to pay the said Jenkins the sum of two hundred dollars (\$200) per month for one year, as a guaranteed salary as a general manager and agent of the southern department of the association. The said Matthews agrees to pay the said Jenkins all the commissions of the membership fee over and above twenty per cent. when the said sum exceeds the sum of twenty-four hundred dollars (\$2,400) for the year. The said Jenkins to give his undivided time and attention to the interest of the association. This agreement shall take effect from the 2nd day

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of January, 1882, and to continue one year. Office rents to be paid by T. W. Matthews.

T. W. MATTHEWS,
S. T. JENKINS.

Atlanta, December 21, 1881.

The evidence establishes that the plaintiff faithfully discharged all the duties pertaining to his employment from the 2nd of January, 1882, until the 2nd June in the same year, when, in consequence of the receipt of a letter from the defendant indicating a desire to modify the contract, he tendered his resignation and discontinued work.

The court decreed in favor of the plaintiff, for \$556.50, which appears to be the balance to which he is entitled upon a proper statement of the accounts; allowing him the sum of \$1,000 as salary for five months, and \$40.50 for office rent, fixtures and commissions, and deducting therefrom the sum of \$484 for advances made in cash and other ways.

The defendant filed a demurrer and answer to the bill. The demurrer assigned no causes of demurrer, but was in general language, and, in accordance with the now common practice with us, was set out in the beginning of the answer. *Dunn v. Dunn*, 26 Gratt. 296. The record does not disclose what disposition was made of it, but we think it must be considered as overruled, for we cannot presume that the court would proceed to adjudicate the principles of the cause in favor of the plaintiff without having first determined upon the sufficiency of his bill. This was the view taken of this subject by the supreme court of West Virginia, in a late case, and it seems to us to be the only one which can be taken consistently with the presumption which usually obtains in regard to all judicial proceedings, in the absence of evidence to the contrary, that there has been a regular and orderly course of procedure. *Hinchman v. Ballard*, 7 W. Va. 171.

It is now assigned as error, however, that the demurrer was

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not sustained. It is argued in support of this position, that the agreement (which is made part of the bill) creates, in legal effect, a contract between the association and the plaintiff, but none between the plaintiff and the defendant; and that the suit should therefore have been brought against the association. To this suggestion we cannot give our assent. The only question to be determined is the purpose and intent with which the plaintiff executed this agreement. Did he intend to bind himself or the association? And this question, we think, may be easily answered upon a simple examination of the terms which the plaintiff has seen fit to employ. Here all the words of promise are the words of the defendant. It is he who agrees to pay the guaranteed salary of two hundred dollars per month, the office rent and the commissions. And he, it is, who signs the agreement without the addition of any words giving notice to the plaintiff that he was merely applying "the executing hand as the instrument of another." In this case we have no parol evidence to aid us in the construction of the contract. It is, however, on its face the personal contract of the defendant Matthews, and unless we are prepared to reverse the rule that a party is to be held to intend what is the plain and manifest import of the language he has used, it must be so held. Nor can the circumstance that he in one place in the body of the instrument speaks of himself as the secretary of the Mutual Endowment Association, overcome or even weaken the effect of these evidences that the contract was personal as to Matthews, and not intended to bind the association. At most, this statement that he was secretary of the association, simply indicates, to use the language of Chief Justice Shaw, in *Bradlee v. Boston Glass Co.*, 16 Pick. R. 347, quoted by Moncure, J., in *Early v. Wilkinson & Hunt*, 9 Gratt., at page 71, "the person for whose account his (the defendant's) statement was made," but does not indicate an intention on the defendant's part to do a mere ministerial act in giving effect and authenticity to the promise of another.

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But it is said, that if this be not the contract of the association, and it is a pregnant circumstance in this connection that defendant nowhere distinctly alleges in his answer that it was the contract of the association, yet the contract was an entire one; that the services of Jenkins were to continue for one year; and that it was incumbent upon the plaintiff to allege and prove, as a condition precedent to his right to recover, complete performance of the condition, or at least that he was deterred by the defendant from the performance thereof. We do not, however, so understand the law. The contract here was, no doubt, that the plaintiff should serve for a year, but the service for the year was not, and in the nature of things could not be, a condition precedent to the plaintiff's right to recover anything, for by the express stipulation of the contract the plaintiff was entitled at the end of each month to recover the salary for that month of \$200. The contract, as a matter of fact, was nothing more nor less than an engagement for one year's service, payable by the month. In *White v. Atkins*, 8 Cush. 367, the plaintiff declared on a special contract, in the form and words following: "Boston, 6 Feb'y, 1849. Articles of agreement made between Thomas G. Atkins and Earl C. White. Said White is to carry on my farm at Bedford, from 1st April, 1849, to 1st April, 1850; and the said White and wife is to have for his and her services the use of the house and furniture, all fire-wood needed, and also to have \$150, one hundred and fifty dollars per year, payable monthly, if he wishes; also the provisions and board, the help and washing that are needed: also his children." The defendant pleaded entirety of contract to serve a year. The plaintiff had left on the 8th July, 1849, and at that time had demanded his monthly payments. Shaw, C. J., at page 370, said: "The contract of the plaintiff was, no doubt, for an entire year's service; but the performance of this entire contract was not a condition precedent to the plaintiff's right to recover anything, because the plaintiff was, at his option, entitled to receive his pay

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monthly. This is one of the tests to determine whether mutual contracts are dependent or independent. If the whole is to be performed on one side, before anything is to be done on the other, they are dependent, and performance is a condition precedent. But if something is to be done on one side, before the whole can be performed on the other, then they are independent. So here, where payments were to be made monthly, at the option of the plaintiff, that is, within the year, the performance of a year's service could not be a condition precedent to demanding a month's pay. *Couch v. Ingersoll*, 2 Pick. 292." He then, further on, remarks, "that a dependent stipulation is a condition, and performance must be averred and proved, in order to recovery, but that mutual and independent stipulations are not conditions, but each party has a remedy by action for non-performance by the other, without showing performance on his own part." And he then points out, as did Foot, J., in his dissenting opinion, in *Peck v. Burr*, 10 N. Y. 301, that in *Real v. Moor*, 19 John. 337, the court took care to remark, that in that case there was no promise to pay monthly. In *Tipton v. Feitner*, 20 N. Y. 431, Selden, J., in the course of his opinion, says: "It is plain of itself, and well settled by authority, that where by the terms of a contract a payment by one party is to precede some act to be done by the other, then the performance of the act cannot be treated as a condition of the payment." And in the same case, Denio, J., at page 479 of the report, puts the case of a contract for a year, the employer agreeing to pay the servant ten dollars at the end of each month; there having been a part performance and subsequent breach by the servant, and the employer being in arrear for several full months. And he then admits that in such a case the servant has the right to recover the wages earned, subject to a recoupment of the master's damages for the time covered by the breach. Now, applying the principles thus announced to the circumstances of this case, we think that the plaintiff was entitled to recover, and that the

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court did not err in overruling the demurrer to the bill. Upon a full review of the case, there being no evidence that the defendant has sustained any damage for the time covered by the breach, as set out in his answer, we are satisfied that the decree of the circuit court of Fauquier county is right, and it must be affirmed.

DECREE AFFIRMED.

Richmond.

HALL'S FREE SCHOOL TRUSTEES v. HORNE.

MAY 7TH, 1885.

CONSTITUTION—*Public free school system.*—Hall's Free School, incorporated by act of assembly passed February 6th, 1846, is no part of the uniform system of public free schools contemplated by the constitution ; and, therefore, the act of assembly approved December 1st, 1884, (Acts Extra Session, 1884, page 173) providing that the superintendent of public schools in the county of Hanover should pay over in each and every year, commencing with 1884, out of the school quota for Beaver Dam district, in the said county, to the trustees of Hall's Free School, a sum equal to the salary paid to any teacher of a school in said district having a like attendance of scholars, to be by them applied to the support of said Hall's Free School, is unconstitutional and void. *State Female Normal School v. The Auditors*, 79 Va. 233.

Upon petition of William Nelson and six others, trustees of Hall's free school in Beaver Dam district in Hanover county, for a writ of *mandamus*, to compel R. R. Horne, treasurer of said county, to pay to them, as such trustees, the sum of \$150, to be applied to the benefit of said Hall's Free School, in pursuance of act of assembly passed February 6th, 1884. Acts Extra Session, 1884, page 173.

Opinion states the case.

Thomas N. Page and *H. T. Wickham*, for the petitioners.

Sands, Leake & Carter, for the respondent.

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LEWIS, P., delivered the opinion of the court.

This is an application for a writ of *mandamus*, to compel the respondent, the treasurer of Hanover county, to pay to the petitioners the sum of one hundred and fifty dollars. The claim of the petitioners is founded on an act of the general assembly, approved December 1, 1884. The act provides as follows: "That the superintendent of public schools of the county of Hanover, be and he is hereby directed to pay over in each and every year * *, out of the school quota for Beaver Dam district, * *, to the trustees of Hall's Free School, a sum equal to the salary paid to any teacher of a school in said district, whose school has a like attendance of scholars, to be by them applied to the support of said Hall's Free School." Acts, Extra Session, 1884, p. 173, *et seq.*

The respondent insists that the money demanded by the petitioners is part of the public school fund for the county of Hanover, raised by taxation, and from other sources, as provided for by the constitution; that the fund so raised cannot lawfully be diverted from the support of the public free schools and devoted to any other purpose; that Hall's Free School is not a part of the uniform system of public free schools contemplated by the constitution, and that therefore the act relied on is unconstitutional and void.

We are of opinion that this defence is well-founded, and that the demurrer to the petition must be sustained. It appears that the trustees of Hall's Free School were incorporated by an act of assembly, passed February 6, 1846, intended to give effect to the will of Aaron Hall, then lately deceased, and who, in his lifetime, was a resident of Hanover county. In the language of his will, the testator devised and bequeathed a portion of his estate "to establish a free school in the neighborhood of my residence, in order that the youth of my acquaintance may enjoy the benefit of the school, and to be under the entire management of my executors." By the provisions of the act, the trustees

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(seven in number), were authorized to receive from the executors the fund so devised and bequeathed, which when received they were directed to invest, in the name of the corporation, in some one or more of the stocks of the state of Virginia, bearing six per cent. interest, and annually or semi-annually to collect the interest or dividends upon the same." The trustees were also directed to establish the school, to employ a teacher or teachers to conduct the same, and to prescribe the branches of learning to be taught therein. Authority was also given them to fix the boundaries of the district within which resident children should be entitled to admission into the school free of charge; to make by-laws and regulations for the government of the school; and to fill any vacancy occurring in their own body from death, resignation, removal out of the county, or otherwise. The act also required the school commissioners of Hanover to pay to the teacher or teachers of the school a fair and equitable portion of the school quota of said county, according to the number of poor children contained in the free school district, to be in lieu of the compensation allowed by the laws then in force for teaching the poor children resident in the said district. And finally, it was provided that the said trustees, or their successors, should annually make to the president and directors of the literary fund a report showing the number of children taught, and at what expense, and also the condition and profits of the fund under their management. Acts 1845-'46, p. 108.

It will thus be seen that the powers conferred on the trustees are of the most comprehensive character. In short, the school is placed under their exclusive supervision and control, subject only to the limitation expressed in the act, that the rules and regulations for its government shall "not be contrary to the laws of this state or of the United States."

It is obvious, therefore, that it is no part of the public free school system of the state, and that it differs therefrom in many and marked particulars. In the first place, the constitution in

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express terms declares that the public free school system for which it provides shall be uniform. In the second place, it provides for a superintendent of public instruction, to have "general supervision of the free school interests of the state;" for a board of education, and for subordinate officers, to whose management and control the system when established was to be confided. And in the next place, the funds for its support are required to be appropriated "for the equal benefit of all the people of the state," the basis of division being "the number of children between the ages of five and twenty-one years, in each public free school district." Const., Art. VIII.

It is true, that after the passage of the act of December 1, 1884, a resolution was adopted by the petitioners, whereby it was ordered that article 17 of the by-laws of the school be altered, so as to read: that "the ages of children admissible into the school-roll be from five to twenty-one years." But the fact remains that the boundaries of the school district are fixed by the trustees, and that the school is none the less subject to their control.

Other points of difference might readily be mentioned, but it is unnecessary to do so. Nor is the case affected by the provisions in the act of 1846, requiring the county commissioners to contribute to the support of Hall's Free School, and requiring the trustees to report annually to the president and directors of the literary fund. The character of the school was not altered by those requirements, and, moreover, they ceased to be operative upon the introduction of the present free school system.

It is needless to inquire whether it would be competent for the legislature to declare this school a part of the public free school system, and to appropriate its funds accordingly. It is sufficient to say that no such attempt has been made, and that by an act, in force April 2, 1873, it was expressly enacted that the fund belonging to the Aaron Hall Free School should not be subject to, nor affected in any manner by, the provisions of section six of an act, approved February 21, 1872, vesting, with

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certain qualifications, in the school boards of the various counties of the state all donations for school purposes which had theretofore been made, or which might thereafter be made, by will, deed, or otherwise. Acts 1871-72, p. 81, *et seq.*; Acts 1872-73, p. 352. The latter act, it seems, was passed at the instance of the trustees themselves, who since that time have continued in the exclusive and undisturbed control of the school and its property.

There is no doubt as to the merits of the school, and the benefits resulting from its operations to the people in its neighborhood. It is also true that many of those whose children attend it are tax-payers, of whom school taxes are annually collected, which go to the support of other schools. But these considerations can have no weight in determining the legal question involved in the present case; that must be determined with reference to the provisions of the constitution alone; and as in our judgment the act in question is repugnant to the constitution, the latter must prevail.

The subject has recently been considered by this court, and with the same result, in the case of the *Trustees of the Normal School v. The Auditors*, 79 Va. 233. What is said in that case is conclusive of this, and the rule must therefore be discharged.

MANDAMUS DENIED.

Richmond.

YATES AND AYRES v. ROBERTSON & BERKELEY.

MAY 7TH, 1885.

1. *Judgments—Relation back—General rule—Exceptions.*—As a general rule, a judgment rendered at any time during a term, relates back to the first day of the term, as if rendered then. This, however, is not always so. The rule does not apply to a judgment rendered during a term in a case which was in such a condition that the judgment could not have been rendered on the first day of the term. *Coutts v. Walker*, 2 Leigh, on p. 303, top; *Brown v. Hume*, 16 Gratt. on p. 465.
2. *ATTORNEY AND CLIENT—Fees—Taxed—By contract.*—The clerk of the court cannot tax against the losing party in a suit, other than the fees prescribed by statute. But contracts, express or implied, between attorney and client for fees, are not limited as to amount, and may be enforced as other contracts.
3. *IDEM—License.*—A client cannot refuse to pay his attorney his fees, though that attorney be practicing without license.
4. *IDEM—Influencing legislation—Bribing—Argument.*—Section 6, chapter 5, Criminal Code of 1878, p. 295, aims at the offence of paying money or other compensation to secure the passage or defeat of any measure, and was doubtless intended to apply to the use of money in buying votes, &c.; and not to contracts with attorneys for purely professional services, such as drafting petitions, setting forth client's claim, taking testimony, collecting facts, preparing arguments, oral or written, addresses to the legislature or its committee, with the intention to reach its reason by argument. Hence contracts for the latter purpose are valid. *Trist v. Child*, 21 Wall. 441.

Error to judgment of circuit court of Danville, rendered 16th June, 1883, in an action of assumpsit then therein pending between H. Robertson and L. C. Berkeley, Jr., late lawyers and

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partners in the firm and style of Robertson & Berkeley, plaintiffs, and David Ayres and Lewis A. Yates, defendants. The object of the suit was to recover of the defendants \$750, for services rendered to them by the plaintiffs as lawyers. The judgment was for that sum with interest from 13th June, 1883, until paid, and costs. To this judgment the defendants obtained from one of the judges of this court a writ of error and *supersedeas*. 'During the trial the defendants offered, but the court refused to give, several instructions, and they excepted, The instructions, with full detail of all the facts of the case, are set out in the opinion of the court.

John Lyon, for the plaintiffs in error.

J. P. Harrison, W. W. Gordon and Withers & Barksdale, for the defendants in error.

LACY, J., delivered the opinion of the court.

The case is as follows: The defendants in error, attorneys-at-law, instituted suit in the circuit court of Danville, against the plaintiffs in error, in *assumpsit*, to recover lawyers' fees of \$750.

The first item claimed was \$500, for defending the defendants against the Commonwealth of Virginia, as sureties on the official bond of Wm. E. Boisseau, late sergeant of Danville, for \$30,000, in the circuit court of Richmond, Va., and setting aside a prior judgment, and making deed of trust from said Boisseau and wife, available for indemnity of said sureties.

The second was a fee for drawing bill for the relief of said sureties, passed by the legislature of Virginia, and advice and services in aid of compromise effected with the state in satisfaction of judgment of \$30,000 against said sureties, \$250.

The defendants plead non-assumpsit. A special jury, free from exception, was selected and sworn in the case, and upon the trial rendered a verdict for the plaintiffs for the sum claimed,

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upon which judgment was entered accordingly. Whereupon, the plaintiffs in error applied for and obtained a writ of error and *supersedeas* from this court.

The first assignment of error here is, that the circuit court refused to instruct the jury: "That under the laws of Virginia, a judgment rendered during the term of a court relates back to the first day of the term, and has precedence of any trust-deed made by the judgment debtor after the commencement of the term and before the date of the judgment."

It is true, that for some purposes our law regards the whole term of a court as one day, so that a judgment given at any time during a term relates back to the first day of the term, as if rendered then. This is not always so, however. The principle does not apply to a judgment rendered during a term in a case which was in such a condition that the judgment could not have been rendered on the first day of the term. While this will oftener, perhaps, occur in equity than in a court of law, it may, nevertheless, and does happen in a common law case, under circumstances that will readily suggest themselves. The judgment may be by confession during the term, in which case no suit had been instituted on the first day of the term. Or, as it did happen in this case, the judgment may be upon notices served or acknowledged after the commencement of the term, and after the execution of the trust-deed in question. And, moreover, by express agreement between the parties in the proceedings in question, the judgments were to be postponed to the trust-deed, both judgments and trust-deed having in contemplation a common object, to subject the property of the principal debtor to the satisfaction of the debt, to the relief, as far as it would go, of the securities on his official bond as sergeant. The instruction therefore had no application to this case, as disclosed by the evidence, was properly refused, and we think the circuit court did not err in refusing the same. *Mut. Assur. Soc. v. Stanard*, 4 Munf. 539; *Coutts v. Walker*, 2 Leigh, 268, 276; *Withers v. Carter*, 4 Gratt. 418; *Jones v. Myrick*, 8

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Gratt. 179; *Brown v. Hume*, 16 Gratt. 465; 1 Lom. Dig. 2d ed. top page 372, 373, 374, and note; V. C. 1873, ch. 182, sec. 6; Min. Inst. vol. 2d, p. 271.

The second assignment of error here is, that the court refused to instruct the jury, "that in the absence of any contract between an attorney and his client about what amount of fee he shall receive for services in any suit, the law fixes the fee of such attorney for such services at \$2.50; and that in the absence of any contract between an attorney and his client respecting the fee such attorney shall receive for services in any suit, the law fixes the fee of such attorney, for such services, at \$2.50:" and giving in lieu thereof the following: "The court instructs the jury, that if they believe from the evidence that the defendants employed the plaintiffs to represent them in getting the judgments against Wm. E. Boisseau in favor of the Commonwealth set aside, and to advise them, and do such other acts as might be necessary to protect their interest as against said claims, and it was understood between the parties that plaintiffs should receive compensation for such services, though the amount of compensation was not fixed; and that the plaintiffs, in pursuance of such employment, performed the service mentioned in their declaration and account filed; then the plaintiffs are entitled to recover what such services were reasonably worth, of such of the defendants as so employed them."

The ground of this exception is, that by section 11, chapter 160, of the Code of 1873, the fee of an attorney is fixed and limited to the amount which the clerk is authorized to tax in the bill of costs in any suit; and that by section 13 of chapter 181 of the Code, such fee in this cause so authorized to be taxed is \$2.50.

Section 11, chapter 160, *supra*, does provide for such a fee; but the section further provides:

"But any contract made with an attorney for other or higher fees, shall be valid, and may be enforced in like manner with any other contract."

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Under the 14th and 15th sections of chapter 76, Code 1819, volume 1st, the lawyers of the commonwealth were limited to fees provided for in the said 14th section; the 15th section providing that no lawyer, in any suit to be brought for his fees or services, shall recover more than the fees so provided, notwithstanding any agreement, contract or obligation made or entered into by the party against whom such suit shall be brought; retaining from the older acts of 1761, chapter 3, sections 11 and 12, of edition of 1769, and chapter 71, section 12, of editions of 1794, 1803 and 1814, the provision, "If such agreement, contract or obligation shall have been entered into before the suit or suits in which such fees shall have accrued, or services been rendered, were finally determined;" which provisions were in force from January 1st, 1820. The legislature, however, January 2nd, 1840, repealed this provision of the law, and enacted the provision, cited *supra*, as part of section 11, chapter 160, of the Code: "But any contract made with an attorney for other or higher fees shall be valid, and may be enforced in like manner with any other contract;" which provision appears in the Code of 1849, and is the law, as we have seen in the present Code.

In arriving at the true construction to be given to this provision of the law, as found in the 11th section of chapter 160, we may observe the striking contrast between the severe restriction to be found in the 15th section of chapter 76 of the Code of 1819, and the entire absence of all restriction in the present law. The policy of the law as to the lawyers, appears to be *entirely* changed, and they are left free to conduct their business transactions with their fellowmen upon the same basis as other citizens; they and those dealing with them to be mutually bound by their contracts, express or implied. Mr. Minor, speaking upon this subject, says:

"In respect to the compensation of attorneys, the policy so long and so vainly persisted in of prescribing and limiting their fees, was abandoned at the revival of 1849, so that since that

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period an attorney may make any contract for fees with his client, and it will be valid, and may be enforced like other contracts (citing section 11, chapter 160, Code 1873); nor does it seem to be material whether the contract is *express* or *implied*, so that if no contract be proved, the attorney will be entitled to receive a fair and adequate compensation for his services. It should be observed, however, that the clerk is not authorized to tax against the losing party any other attorney's fee (whatever the successful adversary may have actually paid), than the very inconsiderable sums prescribed by law, in most cases not to exceed \$2.50 in a court of law," &c. 4 Minor's Insts. 177.

And it may be further said, that this is taxed only on one side, to be paid to the winning side, and nothing is provided as to the attorney's fee on the other side. Under the construction contended for by the plaintiffs in error, what is the fee to be paid to the attorney on the losing side? The law makes no provision for it whatever; it is left to depend upon contract. And this fee, fixed and provided in the statute, is intended for cost, to recompense the party to the cause for his outlay, &c., and is in no wise intended by the law-makers to limit the fee of a lawyer, as between him and his client, which is expressly left to depend upon contract between the parties, which, like contracts growing up in the transactions of other citizens of the commonwealth, may be either express or implied. It follows that the circuit court properly instructed the jury on this subject, and this exception must be overruled.

The next exception to be considered is, the refusal of the court to instruct the jury, "That if they believe from the evidence in this cause that any portion of the sum sued for in this action is for fees, reward, or compensation to the plaintiffs for appearing before any committee of either branch of the general assembly, and speaking, writing or printing, or using before them any argument for or against any measure or proposition to be passed upon by the general assembly, then they must find for the defendants, as to such portion of the sum claimed by the

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plaintiffs; unless the jury shall also believe, from the evidence, that the plaintiffs at the time of so appearing, &c., before such committee, &c., had paid the license tax of \$100, provided for in section 94, chapter 289, pages 311 and 312, Acts 1874-1875;" and the action of the court in instructing the jury, "If the jury believe from the evidence that the defendants, or some of them, employed the plaintiffs to advise them as to the best time and mode, and then to assist them in obtaining the passage of an act of the legislature for their relief, as sureties of the said William E. Boisseau, sergeant of the town of Danville, and promised them compensation for their advice and services in so doing, and that the plaintiffs did so advise, and did prepare a bill for the relief of said sureties, and did cause the said bill to be introduced into the legislature of Virginia, and did prepare a brief statement of the facts and grounds upon which the relief was prayed for, and cause the said brief or statement to be put into the hands of the chairman of the committee of the legislature, and other leading members thereof, so as to inform them, and through them the legislature, of the said facts and grounds, such action and services of the plaintiffs are not forbidden by law, and for such advice and services so rendered, the plaintiffs are entitled to recover in this action a reasonable compensation against such of the defendants as so employed the plaintiffs."

The court further instructed the jury, "That the law of Virginia makes it a misdemeanor for any person to pay or receive money, or other compensation, directly or indirectly, for the purpose of securing the passage or defeat of any measure by the general assembly; and if they believe from the evidence that any part of the claim made in this suit is for compensation for such services, that the plaintiffs cannot recover such portion." This last instruction being given by consent of both sides, and not excepted to by either.

The question raised by this exception is the refusal of the court to instruct the jury that the attorney could not recover

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any compensation for appearing before any committee of the legislature, as such, in advocacy of the rights or interests of his client, unless he had paid the license tax required by law of \$100.

In the first place, it is not discernible from the record that the plaintiffs did appear before any committee of the legislature concerning this business, or that any evidence was introduced on either side tending to prove such appearance. To appear in advocacy of any measure before a committee of the legislature, as retained counsel, is a privilege for which a license tax is required by law; to so appear without paying the required license tax is a misdemeanor, for which the statute prescribes a penalty; but the loss of the value of the services is not the prescribed penalty, and such penalty as is prescribed is not to be enforced in this suit, nor in the forum where this suit was tried. If these lawyers had practiced their profession without a license, either in the circuit court of Richmond or before the committees of the legislature, they would have violated the revenue laws of this commonwealth, and been liable to prosecution thereunder therefor; but their clients cannot *on that account* refuse to pay them their fees. No such punishment or penalty is prescribed for this violation of the statute, and an offence which is punishable by statute, can be punished in no other way than that prescribed by the statute. It is a general rule, that a contract founded on an act forbidden by statute under a penalty, is void, but it does not necessarily follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in consideration of it. See *Middleton v. Arnolds*, 13 Gratt. 489; *Niemeyer v. Wright*, 75 Va. p. 243, opinion of Burks, J., and the authorities therein cited. But in this case there is no claim that the plaintiffs appeared before a committee, nor, except so far as thus suggested, that the license fee required by law had not been paid. See also *Lester and wife v. Howard Bank*, 33 Md. 558; 3d Amer. Rep. 211.

As to the instruction given in lieu of the instruction so re-

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jected, set forth above, it would seem that the 6th section of chapter 5 of the Criminal Code, Acts 1877-78, p. 295, which provides that, "Any person who shall pay or receive money, or other compensation, directly or indirectly, for the purpose of securing the passage or defeat of any measure by the general assembly of this state, shall be guilty of a misdemeanor, and if convicted thereof, shall be punished by confinement in jail not exceeding twelve months, and by fine not exceeding \$5,000," could not have been intended to apply to the compensation received by attorneys serving their clients as such before the legislature, in matters where their interests are involved. For by the terms of the law such attorneys are allowed to practice in such case, upon the payment of a license tax. The penalty prescribed would indicate that the offence aimed at was highly penal. "Pay money or other compensation" for "the purpose of securing the passage or defeat of any measure," was doubtless intended to apply to the use of money in the line of bribery and corruption, debauching the members, or buying votes. It cannot reasonably be held to refer to honest and honorable service rendered by a lawyer for a client, against whom the commonwealth has a demand growing out of the collection of her revenue.

But however that may be, in this case the court instructed the jury on this subject in the language of the statute, to which there was no objection on either side. The services defined and set forth in the sixth instruction given by the court, would seem to be legal and proper, and not in violation in any way of the law. To prepare a bill, advise their clients as to the best time and mode, and to assist them in obtaining the passage of a bill for their relief, and to prepare a brief statement of the facts and grounds upon which the relief was prayed for, and cause the same to be put in the hands of the chairman of a committee and other leading members, to inform them, and through them the legislature, of the said facts and grounds, &c., could not reasonably be held to come under a statute which

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forbids the use of money in procuring or defeating legislation, under a penalty of twelve months imprisonment and a fine of \$5,000. It is a rule of the common law, of universal application, that where a contract is tainted with immorality, or is against the maxims of sound public policy, as to the consideration of the thing to be done, no alleged right founded upon it can be enforced in a court of justice. *Marshall v. R. R. Co.*, 16th Howard, 314, and cases cited.

But, as was said by the Supreme Court of the United States, in the case of *Trist v. Child*, 21 Wall. 441, decided March 22, 1875—"We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for such professional services, is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee, or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable."

We think the circuit court did not err in giving the said sixth instruction, and the exception upon that ground must be overruled.

This covers all the exceptions raised in this court.

The facts proved are not certified, nor is there a statement of the evidence in the record. The verdict and judgment cannot be reviewed upon the merits, but upon the questions of law raised by the exceptions. For the foregoing reasons, we are of opinion to affirm the judgment of the circuit court of Danville.

JUDGMENT AFFIRMED.

Richmond.

BLAIR, ATTORNEY-GENERAL, v. MARYE, AUDITOR.

MAY 7TH, 1885.

1. CONSTITUTIONAL OFFICERS—*Attorney-General—Compensation.*—By section 8, article 6, state constitution, the election and commissioning of an attorney-general is provided for, and it is directed that he shall perform such duties and receive such compensation as the law may prescribe. It is not within the power of the legislature itself to withhold from him the salary which is prescribed by law, nor to delegate such power to the auditor.
2. IDEM—*Idem—Idem—Offset.*—The salary of the attorney-general is of constitutional grant, and of public official right, and the doctrine of *offset* cannot be applied to it. It is not liable to attachment, to garnishment, nor to assignment in bankruptcy, and upon principles of *public policy*, it has absolute immunity from detention for debt or counter claims.
3. IDEM—*Withholding salaries.*—The act of assembly passed November 24th, 1884, Acts (extra session) 1884, page 90, requiring the auditor to withhold the salary of any officer who is indebted to the state for money collected by him, or improperly drawn by him during his term of office, until the default is made good, is unconstitutional and void, so far as it affects constitutional officers.
4. IDEM—*Idem—Remedy.*—The officer's remedy for the withholding of the salary attached to his office, is by *mandamus*.

Upon petition of F. S. Blair, attorney-general for four years, commencing January 1st, 1882, asking for a writ of *mandamus* to compel Morton Marye, auditor of public accounts, to pay to petitioner the sum of \$833.33 $\frac{1}{3}$, due him at the date of his petition, as his compensation prescribed by law, and for the payment

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whereof the general assembly had made appropriation for the months of November and December, 1884, and of January and February, 1885, which petitioner had demanded, but which said auditor refused to pay. To a rule *nisi* served on said Marye the latter demurred, and answered the petition. In his answer, he set up that the petitioner had, during his term of office, drawn without authority of law, the sum of \$5412.87 from the treasury, whereof nothing had been repaid, and that the petitioner, by the act of 24th November, 1884, could not receive any salary until said sum so overdrawn had been repaid. To this answer, the petitioner demurred and replied.

The details are set forth in the opinion.

John H. Guy and *W. W. Field*, for the petitioner.

W. R. Meredith, for the respondent.

FAUNTLEROY, J., delivered the opinion of the court.

Upon the petition of F. S. Blair, attorney-general of Virginia, representing that, at the regular election held on the fourth Thursday in November, 1881, he was duly elected to the office of attorney-general of the state of Virginia: that he has been duly commissioned, and has qualified as such in accordance with the constitution and laws of Virginia; that he has entered upon the discharge of his official duties as such attorney-general; that his term of office commenced on the 1st day of January, 1882, and continues until 31st of December, 1885; that he is a constitutional officer, made such by Article VI, section 8, of the constitution of the state; that the constitution provides that he shall receive such compensation as may be prescribed by law; that at the time of his qualification his compensation as such attorney-general prescribed by law was \$2500 per annum; that it was payable annually; that the general assembly by its appropriation bill of the public revenue

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for the fiscal years of 1884 and 1885, appropriated and set apart the said sum of \$2500 for his compensation; that the attorney-general is peculiarly a constitutional officer; that there is now due to him his salary for the months of November and December 1884, and January and February, 1885, amounting to \$833.33 $\frac{1}{3}$; that he made application to the auditor of public accounts of the state of Virginia, whose duty it is, by law, to issue his warrant on the treasurer of the state for the payment of his said salary; yet the said auditor refused and still refuses to issue his warrant on the treasurer for the payment of the same, or any part thereof; it was ordered by this court on the 10th day of March, 1885, that Morton Marye, auditor of public accounts of the state of Virginia, do appear here on the 17th of March, 1885, and show cause, if any he can, why the commonwealth's writ of *mandamus* should not be awarded to the petitioner, to compel the said auditor to issue his warrant on the treasurer of Virginia, to pay his said salary to petitioner, for the months of November and December, 1884, and January and February, 1885, with interest thereon from the date of its unlawful detention; and for the payment of such future salary as shall become due and payable to petitioner as said attorney-general until the expiration of his said term of office.

To this rule the said auditor of public accounts, Morton Marye, made return, admitting the due election and qualification of the petitioner, as attorney-general of Virginia, and that the compensation prescribed by law for the said officer is \$2500 per annum, payable monthly; that the general assembly has appropriated the said sum for the salary of the said attorney-general for the years 1884 and 1885, respectively; and admitting that he had refused to draw his warrant for petitioner's salary, as claimed, for the months of November and December, 1884, and for January and February, 1885; and that he so withholds the said salary, by virtue of an act of the general assembly, passed November 24th, 1884, making it unlawful for the auditor of public accounts to issue his warrant to petitioner for his

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said salary until the said petitioner shall have made good to the state the sum of \$5412.87, which the special committee of the house of delegates appointed to enquire what sums have been drawn from the treasury by the attorney-general, F. S. Blair, other than his salary, reported overdrawn by him, and due the state. To this return by the said auditor of public accounts, the petitioner demurred; and in said demurrer the said auditor joined, and to said return the petitioner made replication, in which he replied, that the said return was not only insufficient in law, but that, in point of fact, there is no indebtedness on his part to the state, and no report to that effect from the said special committee of three; that the said committee did sit for several days, and took proof in said regard, and failing to agree, two reports were made from said committee—a majority report, relied on by the auditor, claiming an indebtedness against the petitioner, while the minority report, which is filed with the replication, shows there is no such indebtedness, and that petitioner had not been paid any moneys which he was not entitled to receive by law, and upon the warrant of the auditor of public accounts; that these two reports from this special committee of investigation were returned to the house of delegates, and were not approved or acted upon by the said house of delegates, which alone had ordered the investigation; and that the general assembly adjourned *sine die* on December 1st, 1884, nearly two weeks after said reports had been made, without any action upon them whatever; that the powers and existence of the said special committee of three, terminated with the final adjournment of the house appointing it; and that the said majority report, relied on by the auditor, became *ipso facto* null and void, and of no effect whatever; and that the non-action of the legislature upon the elaborate investigation and voluminous evidence taken and reported in the premises, affords strong presumption that there is no indebtedness on the part of the petitioner to the state, and no reason for any action in the matter. Upon these pleadings and facts presented in the record, this court has now

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to test the legality of the action of the auditor in withholding the salary of a constitutional officer of the state government of Virginia, for an *assumed* indebtedness, under and by authority of the act of the general assembly, found on page 90 of the Acts of the last of the extra sessions of 1884, entitled "an act to provide for securing to the state money due to it by any of its officers."

Section I. enacts, "that whenever any officer of the state is indebted to the state for money collected by him, or improperly drawn by him, or upon his order, from the public treasury during his term of office, and after demand for the same by the auditor, continues in default in the payment of the same, it shall not be lawful for the auditor to issue to the said officer a warrant for, nor for the treasurer to pay, any part of the salary due or to become due to such officer, until he shall make good his default. The officer whose salary is thus withheld, may, however, file his petition in the circuit court of Richmond city, making the auditor a party thereto, and praying the payment of his salary. The auditor shall make answer to this petition, and the proceedings *shall* be conducted as a suit in chancery is conducted, except that there need be no proceeding at rules. Upon the proof taken and read in the cause, the court shall decide the fact of indebtedness, and the right of the officer to draw his salary, or the right of the state to credit the same upon the indebtedness of the officer, and a judgment may also be rendered against the officer for any indebtedness that may exist in excess of the amount of the salary then due, and for the application by the state of such salary as may thereafter accrue to the payment of the debt." * * *

Applying to this act of the general assembly the touchstone of the constitution of Virginia, we find, that in its express terms, as well as in its practical operation, it contravenes one of those great and sacred rights which "do pertain to the good people of Virginia, and their posterity, as the basis and foundation of government." Article I., section 13, of the constitution

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of Virginia declares, "that in controversies respecting property, and in suits between man and man, the trial by jury is preferable to any other, and ought to be held sacred."

The act under review, after putting the salary and constitutional compensation of any and every constitutional officer of the state, at the good or ill-will of a ministerial basement officer, whose tenure of office is, every two years, dominated by a casual majority of the legislature, permits the officer whose salary is thus withheld, to file his petition in the circuit court of Richmond city; and imperatively commands, that "the proceedings shall be conducted as a suit in chancery is conducted, except that there need be no proceeding at rules." A suit in chancery is conducted (even where delay is not designed, nor is an object,) by all the intricacies of systematic pleadings and proofs, and arguments, and submission to and consideration by the court, *without a jury*—unless the chancellor may need and choose to order the intervention of one to aid and inform his judgment and conscience. It matters not that the petitioner *may* ask for, and probably obtain, a jury, from a considerate and conscientious judge: under the express mandate of this act, his absolute and constitutionally guaranteed right to *demand* a jury, is taken away; and hangs upon the permission or refusal of the judge. The best and the purest judges—like all other men—pass away; and their high places may be, as historically once in the English judiciary, filled by the versatile minions of power, and the pliant partizans of dominant faction; and the evil portents of the day admonish us that history repeats itself.

The office of attorney-general of Virginia, is of *constitutional* creation, and not of *legislative* enactment; and the salary of the office, though left to be fixed and appropriated by law, is within the express protection of the constitution. By Article VI, section 8, under the head of the judiciary department, of the constitution of Virginia, it is provided, "At every election of a governor, an attorney-general shall be elected by the qualified vot-

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ers of this commonwealth. He shall be commissioned by the governor, perform such duties and receive such compensation as may be prescribed by law, and shall be removable in the manner prescribed for the removal of judges." The office, with its constitutional requirements for compensation, is vested in the attorney-general elected by the people for a term of *four* years. It is not founded on contract, but on constitutional grant, which implies a prohibition of legislative authority to withhold the salary of the office which has been "prescribed by law." In the case of *Foster v. Jones*, 79 Va. 642, Judge Hinton, speaking for this court, says: "We think it may fairly be assumed in the outset to be an undeniable proposition, that the two branches of the legislature, as the direct representatives of the people, have the right, when no restrictions have been imposed upon them, either in express terms, or by necessary implication, by the constitution, to create and abolish offices accordingly as they may regard them as necessary or superfluous. And that they may also, under like circumstances, deprive the officers of their salaries, either directly by removing them from office, or indirectly by so changing the organization of the departments to which they are attached as to leave them without a place. But, of course, this power in the legislature cannot be construed to extend to any of the various classes of officers which are known as constitutional officers." (*Loring v. Auditor*, 76 Va. 942; *Commonwealth v. Gamble*, 62 Penn. St. Reps. 343; *Fletcher v. Peck*, 6 Cranch, 87.) The legislature *must* prescribe some compensation to the attorney-general; and when prescribed and fixed by law, the behest of the constitution is that he "*shall receive* such compensation as may be prescribed by law." It is not within the power of the legislature to withhold it; and *a fortiori*, they cannot depute such a power to the auditor. To allow such a power would be to annul the will of the people expressed in the constitution, and to place the organized existence and integrity of the constitutional government of the state at the feet and caprice of revolutionary domination

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and *party* supremacy in the legislative department of the government. If, thus, they can withhold the salary of *one* constitutional officer, according to the disposition of the legislature or auditor towards him, they can make the tenure of all the functionaries of the government, *executive* and *judicial*, depend, absolutely and *abjectly*, upon their will and humor, and stop the wheels of government at the bidding of passion, prejudice or *party*. *Vide Swann v. Buck*, 40 Miss. 302; *People v. Bangs*, 23 Ill. 527; *People v. Gary*, 6 Cowan, 642; *McCullow's case*, 1 Cowan, 550; *State v. Menmore*, 14 Wis. 163. The authorities all recognize and establish the doctrine, that a constitutional office is beyond the reach or control of legislative authority, except in the manner and to the extent expressed in the constitution; and that where a salary or compensation is provided by the constitution, it is an incident to the very office itself, and cannot be detached from it. The right to the salary follows the office, as shadow follows the substance. *Baxter v. Brooks*, 29 Ark. 201; *People v. Tieman*, 30 Bar. 193 and 359; *Cordin v. Huff*, 10 Ind. 86; *Dorsey v. Smythe*, 23 Cal. 23; *Stratton v. Dalton*, 23 Cal. 51; *State v. Menmore*, 14 Wis. 172; *Carroll v. Siebenthaler*, 37 Cal. 195.

In the *State v. Steele*, 57 Texas, 204, it was decided that the legislature itself, has no power to refuse to pay the salary of a constitutional officer, where the constitution directs the legislature to fix the salary.

The case of *Fant v. Gibbs*, 54 Miss., was a case where district attorney Fant compelled the auditor (Gibbs), by *mandamus*, to issue a warrant on the state treasury for a month's salary, for which the auditor had refused to issue his warrant.

The provision of the constitution of Mississippi, was almost identical with that of the Virginia constitution, in Article VI. It provided, "There shall be an attorney-general elected by the qualified electors of the state, * * * whose term of service shall be four years, and whose duties and compensation shall be prescribed by law." On page 410, the court declares, that,

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whether duties or salary be withheld by the legislature, it is wholly at war with the genius of our institutions; and proceeds to say: "It would be an exceedingly delicate matter for this court to declare that the compensation provided for any officer was not suitable, and we would certainly never do so where the salary, however low, had been fixed on a basis deemed by the legislature to be sufficient: but where it was clearly not so fixed, but was a mere partisan device to get rid of an obnoxious officer, it might be our duty to interfere. Suppose, for instance, that a legislature, dominated by a political party different from that of the officers belonging to the state department in the capitol, should reduce their salaries to five dollars per annum, in such a case we might feel compelled to interfere." On page 414, the court says: "If the legislature takes away from that officer (the district attorney), chosen by the qualified electors for the term of four years, all territory, so that there is no place where he can perform the duties annexed by law to the office, *or if it withdraws compensation* * * *, such legislation would conflict with the constitution. If his compensation is cut off, the legislature has *starved him out*, and done *by indirection* what it would not be pretended could be done *directly*." On page 415, the court says: "It seems to me impossible to put any other construction on the act of the legislature, in the particulars referred to, than that it is an indirect *ouster* of Fant from his office as district attorney." And, on page 416, the court says: "The reduction of the salary to one hundred dollars, was part and parcel of the plan to evade the constitution; * * * while the legislature carefully refrains from declaring, outright, that he shall no longer be district attorney, it accomplishes the same result by indirection." The court decided that Fant was entitled to his salary, and awarded a *mandamus* to compel the auditor to pay it. The abolition of fees compensation or salary, is a virtual abolition of the office itself—*vide* Smede's (Miss.) Digest, sect. 153. In *Warner v. The People*, 2 Denio, N. Y., 281, it was declared, that when the legislature assumes the power to

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take from a constitutional officer the substance of the office itself (whether the term, duties or compensation), it is not a legitimate exercise of the right to regulate the duties or emoluments of the office, but is *an infringement upon the constitution*. In the case of *State v. Dural*, 26 Wis. 414-15, it was expressly adjudged, that the emoluments of an office cannot be *detached* from it. The same doctrine is sustained by the principle and reasoning of the court in *Warner v. People*, 2 Denio, 272; *State v. Hastings*, 10 Wis. 525; *McCabe v. Muzzlechelli*, 13 Wis. 478.

In the supreme court of North Carolina, in the case of *Cotton v. Ellis*, 7 N. C. (Jones' Law), Chief Justice Pearson delivered the unanimous opinion of the court, and declared that while, in some instances, the legislature may reduce or increase the salaries of such officers as are not protected by the constitution, during their term of office; yet, it cannot deprive them of *the whole*. "A statute which reduces a salary during the term of office, and one which takes away the salary altogether, stand on a different footing; for, in the latter case, the *object* would evidently be to *starve* the incumbent out of his office; and thereby do, indirectly, what could not be done directly. So, to make applicable the remarks in the case of *Hoke v. Henderson*, in which there seems to be much force, that such indirect legislation is as obnoxious to the charge of being unconstitutional, as an act directly depriving one of his office. Such legislation would place the legislature in this attitude: 'We mean to abolish the office: if we have not the power to do so, then we mean to deprive the present incumbent of his office; if we have not the power to do that, then we mean to take away his salary.'" The *mandamus* in this case was made peremptory, compelling the issuance of a warrant upon the public treasury for the payment of the salary. The election of officers by the people, as prescribed in the constitution, is a sacred right; and any attempt to take it away by starving an incumbent, by withdrawing his salary, and so compelling the officer to vacate his office, is in violation of the constitution, by indirection or evasion,

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which calls for the interference of the courts: whose duty it is to test every law by the constitution. *People v. Ball*, 46 N. Y. 57; *Brady v. Howe*, 50 Miss. 621; *O'Leary v. Adler*, 51 Miss. 33; *Cotton v. Ellis*, 7 Jones, (N. C.) 545; *King v. Hunter*, 6 Amer. Rep. 756; *Barney v. Baltimore*, 6 Wall. 288; *Rison v. Farr*, 24 Ark. 166; *Conner v. City of N. Y.* 2 Sand R. 369, 370.

"An office" (says Kent, vol. 3, p. 434,) "consists in a right, and correspondent duty, to execute a public trust, and to take the emolument." (So also, Crim. Digest, vol. 3, p. 117.) The salary and perquisites attach to public offices on grounds of public policy. *People v. Miller*, 24 Mich. 458.

The legislature has no power to put a constitutional officer in *such a situation* that he cannot hold his office, and discharge its duties, until the constitutional term has expired. *Vide, People v. Gary*, 6 Cowan, 644; *Ex parte McCullom*, 1 Cowan, 550; *Comm. v. Gamble*, 62 Penn. Stat. (B. F. Smith), 343; *People ex. rel. Ballou v. Dubois*, 23 Ill. 547; *Lore v. Baehr*, 47 Cal. 367.

The public service is protected by protecting those engaged in performing public duties; and this, not on the ground of private interest, but upon the necessity of securing efficiency in the public service, by seeing to it that the compensation provided for its performance, shall be received by those who are to perform the work; but the *withholding* the salaries and emoluments of constitutional public officers, would prove hurtful and even disastrous to the public service.

The auditor, in his return to the rule *nisi*, "averts that chapter 98, of acts of extra session, 1884, is a plain and adequate remedy sufficient to afford the said petitioner all the relief necessary to his case:" but the answer is that the attorney-general would be *starved out of his office* before he could get a trial of the case in the circuit court of the city of Richmond; and even after a judgment in that court, an appeal to this court might not, and in its turn, could not, be reached before the termination of his term of office. What source of maintenance would the attorney-general have during the pendency of his

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suit in the inferior and appellate courts, under the act of assembly invoked by the auditor for the justification of his conduct?

That *mandamus* is the proper remedy in this case, cannot be seriously controverted. The Code of Virginia, 1873, chapter 156, section 4, page 1049, gives the remedy by *mandamus* in *all cases* in which it may be necessary to prevent a failure of justice. And this court, in *Lewis v. Whittle*, 77 Va. 415, (Judge Lacy delivering the opinion) says, that *mandamus* should be allowed whenever there is a right of which one is dispossessed, and he has no adequate remedy. *Wise v. Bigger*, 79 Va. 269; *Town of Danville v. Blackwell*, *Judge*, ante p. 38.

The following decisions are express adjudications that *mandamus* is the proper remedy in cases like this, although a remedy by statute may exist:

Bluck v. The Auditor of the State, 26 Ark. 288; *Reynolds, Auditor, v. Taylor*, 43 Ala. 420; *Dorsey v. Smythe*, 23 Cal. 25-51; *State v. Weston*, 4 Nebraska, 219-244; *State v. The Auditor*, 33 Miss. 291; High on Ex. Rem. sec. 104; *Page v. Harden*, 8 (B. Mon.) Ky. 648.

The entire salary of the attorney-general of Virginia is now withheld from him by the auditor of public accounts; and has been so withheld since October, 1884; and the said auditor expressly avers in his return, that he will continue to withhold the salary now due and to become due to F. S. Blair, until the money now owed by the said petitioner to the state (as he assumes and alleges) shall have been fully paid and discharged, as by law he is required to do. Thus the attorney-general, who is the constitutional adviser of the executive of the state, and the law-officer of the commonwealth in the state and federal courts, and whose services are constantly and imperatively indispensable to the public business and interests of the state, is disabled by the conduct of the auditor from the performance of his official public duties, and is virtually ousted from his office by an act of the general assembly of Virginia, which authorizes and instructs a mere ministerial officer to assume and exercise judi-

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cial functions, in passing judgment and inflicting an ignominious and baneful punishment, upon any or all of the constitutional officers of the state government, whenever and *however* he shall be thereto impelled, even to the extremity of a virtual destruction of the state government.

It is not pretended by the auditor, that the attorney-general has overdrawn *his salary*; but he makes the dangerous assumption of withholding *his salary* as attorney-general, on the ground of alleged indebtedness to the state in the matter of fees and compensation allowed to the petitioner by the governor and the auditor himself, for extra official services as an attorney-at-law; and which were paid to him on the warrants drawn by the auditor for the same, according to law. The services and salary of a public officer are founded in constitutional grant, and not in *contract*; and they have none of the affinities or liabilities under the law of contract. The salary of the attorney-general is of constitutional grant and of public official right; and the doctrine of *offset* cannot be applied to it, as the auditor asserts a right to do in this case. It is not liable to *attachment*, nor to be *garnisheed*; nor to assignment in bankruptcy, and, upon principles of *public policy*, it has absolute immunity from detention for debt or counter-claim. *The Auditor v. Green Adams*, 13 Ky. Rep. (B. Monroe) 150-1; *The Auditor v. Cochran*, 9 Ky. 8; *Divine v. Harvey*, 7 Monroe (Ky.) 439; *Arbuckle v. Cowan*, 3 Bos. & P. 328; *Bliss v. Lawrence*, 13 N. Y. (Sickles) 444; *Browning v. Bitts*, 8 Paige, 568; *McCowan v. Rosheimer*, 1 Clarke's Ch. 144; Daniel on Attach. and cases there cited; *Flosty v. Odlaw*, 3 T. R. 681; *Liddlerdale v. Duke of Montross*, 4 T. R.

In the supreme court of Maryland, (in case of *Thomas v. Owens*, 4 Maryland,) the court say: "The question is, have the people given their consent to the payment of the *salary* of the comptroller? That they have done so, is palpably manifest. They have said he 'shall receive an annual salary of \$2500.' They have not merely said he may *claim* such a sum; but, em-

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phatically, that he '*shall receive*' it. It is impossible for human language to be less ambiguous or more positive. The people in their organic law—which is paramount to all other law—have not only given their *consent*, but they have imperatively issued their command, that the particular officer '*shall receive*' it. How is their will obeyed, if it be within the power of the treasurer, or anyone else, to withhold it from caprice, unfaithfulness to duty, or from *mistaken judgment*? To allow of such a power in that officer, would be to put him above the *constitution*, whose creature he is. It would be to invest him with authority to annul the *sovereign* will—in fact, to stop the wheels of government, and reduce things into the wildest confusion. The constitution has said the officer '*shall receive*' his salary, and this *fiat* of the supreme will is not to be nullified by the mere *ipse dixit* of a mere *ministerial* officer—for such, and none other, is the treasurer. An opposite interpretation would countenance this paradox:—that a *co-ordinate branch* of the government could stop its whole machinery, *by refusing to pay the salaries of those upon whom is devolved the discharge of the duties of the other branches.* * * * It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within (constitutional) limits. It is prescribing limits, and declaring that those limits may be passed at pleasure." (1 Cranch, 178.) "Now, it is presumed, it would not be contended by any one, however hazardous, that if the legislature were to pass an act *diminishing* the salary of the *governor*, or of any other officer whose salary is fixed by the constitution, that such an exercise of power would be rightful and constitutional. If it be not competent to the legislature to take away *a part*, by what process of reasoning can it be maintained, that they can take away the *whole*?"

But if it be admitted, for the argument, that the act of the general assembly referred to by the auditor as the authority for his withholding the salary of the attorney-general, does not encroach on constitutional rights, and assume to exercise *judicial*

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function, still, there is nothing in the act which can justify or authorize the act and attitude of the auditor in *assuming* that the petitioner is indebted to the state on any account. The act itself does not so declare or imply; and there has been no act or declaration by the legislature ascertaining the fact, and directing suit or other proceeding against the attorney-general for any indebtedness; and the replication of petitioner to the auditor's return, denies the fact of any indebtedness to the state on the part of petitioner, and shows, by necessary and pregnant inference, that the legislature, after stringent, searching and severe investigation, so admitted, by their total non-action and significant silence.

The assumption of the auditor is wholly unwarranted by the act, and is unsupported by the facts of the case. The language of the act (which, being punitive and ignominious, must be literally and critically construed), is, "Whenever any officer of the state *is indebted* to the state," &c. Who is to adjudge and define that indebtedness? And must it not, of legal necessity, be confined only to an ascertained, liquidated or admitted indebtedness? Will not anything beyond this trench upon the *judicial* department, and be the exercise of *the essence of judicial function*? The auditor, in his return says, "the said petitioner has, improperly and without authority of law, drawn from the treasury, during his term of office, the said sum of \$5412.87." He does not explain how this *is possible*, under the system of guards, and checks and balances, used in the payment of money out of the treasury of the state; but the record in this case shows that every dollar paid to the attorney-general has been paid *upon the warrants* of the auditor, and after certificates from the clerks of this court, and of the circuit court of Richmond city, and the Supreme Court of the United States, *according to law*.

The auditor now assumes to make the act of assembly *ex post facto* in its application, and to go back and behind of the *audit* and *warrants* of himself and of his predecessors in office, from

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the beginning of the official term of the attorney-general, January 1, 1882; and, by his own adjudication, *recoup* allowances made to the attorney-general by the auditor's warrants upon the treasurer for each and every account and item.

The fact is, that if any money has been paid to the attorney-general "*improperly*;" upon the *warrants* of the auditor, on any account whatever, there cannot thereby be any indebtedness of the attorney-general to the state; it would be only a matter of responsibility of the auditor himself, and his sureties on his official bond. Will he withhold his own *salary* and sue the state for it in the circuit court of the city of Richmond, in super-serviceable obedience to this act of the general assembly, under which he justifies his withholding of the salary of the attorney-general of Virginia?

On page 172 of House Journal, extra-session, 1884, it appears, that "No. 148, house engrossed bill to provide for securing to the state money due to it by any of its officers, was * * taken up, out of *its order* on the calendar, and passed." And that next, and immediately thereafter, the correlative act, "No. 147, house engrossed bill to provide for *filling a vacancy in the office of attorney-general*, was * * * taken up out of *its order* on the calendar, and passed."

It was stated in the argument, and admitted by the eminent and able counsel on both sides of this case at bar, that General *James G. Field*, the distinguished and honored immediate predecessor of petitioner, in the office of attorney-general of Virginia, had placed exactly the same construction upon the law regulating his fees of office, and had drawn from the treasurer of the state the same fees of office as Attorney-general Blair had done, upon the proper certificates of the clerks of courts, state and federal. and upon the audit, allowance and warrants of the auditor of the state; that he is in exactly similar case with petitioner, his successor.

It is, we think, abundantly clear, from the record, that there can be no possible legal or moral wrong in the acceptance of

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these fees of office by either Attorney-general Field or Attorney-general Blair, as they were paid to them, and they accepted them, under a claim of right, and under the construction and practice of the law, placed on the statutes by the clerks of the courts, the *auditor of public accounts*, and the treasurer of the state. They *all* acted conscientiously, in what they believed to be the discharge of official duty and legal right.

We are of opinion that the respondent, Morton Marye, auditor of public accounts of Virginia, has not made a good and sufficient return to the rule *nisi*; that the demurrer to the said return be sustained; and that the rule must be made absolute; and the *mandamus* issue according to the prayer of the petition.

Let a peremptory *mandamus* issue.

RICHARDSON, J., concurred in the opinion.

HINTON, J., said he did not concur wholly in the opinion, but did concur in awarding the *mandamus*, on the ground that the attorney-general is a constitutional officer, and cannot be deprived of his salary during his continuance in office.

LEWIS, P., dissented.

LACY, J., dissenting, said:

I am of opinion to deny the prayer of the petitioner in this case.

The manner of paying salaries to the officers of the government is within the province of the legislature. The constitution provides for the office of attorney-general, and the way in which he may be removed from office, and he can be removed in no other way. But the method by which his salary is paid is prescribed by law, and this prescription of the law is subject to amendment, and alteration, as the wisdom of the legislature may suggest, for the public good: provided such amendments

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do not violate any provision of the constitution, in letter or in spirit.

The act in question does not take away the salary of the attorney-general. It provides for the case of a public officer who in collecting his salary, or other allowances provided as compensation for his public services, may, by overdraws or other erroneous collections from the commonwealth, have become indebted to the commonwealth. The determination of any questions which may arise in such a case is not left to the determination of the auditor, but is submitted under the act of assembly here drawn in question, to be judicially made by the circuit court of Richmond, which is the tribunal designated by law for the trial and determination of suits for or against the commonwealth. The act in question does not violate either the letter or the spirit of the constitution, and should be sustained in this court, as coming within the range of the legislative power.

MANDAMUS AWARDED.

Syllabus.

Wytheville.

COBBS, ASSIGNEE, v. GILCHRIST'S ADM'R AND ALS.

JUNE 11TH, 1885.

1. APPELLATE COURT—*Dismissal of appeals*.—Order dismissing appeal or writ of error, effects same purpose as affirmance. Code 1873, chapter 178, section 18.
2. BANKRUPTCY—*Actions by or against assignee*.—U. S. Revised Statutes, section 5057, limiting actions by or against assignees to two years after accrual of rights, applies to all litigation between him and any adverse claimant.
3. IDEM—*Case at bar*.—By decree H.'s lands were subject to certain liabilities. H. devised his lands to L. and to J. Between them partition was made. L. was adjudicated a bankrupt. C., her assignee, became party to the suit. In 1876, a decree apportioned the liabilities between the lands of L. and of J., and directed sale. Sale was made and proceeds collected. Then a personal fund amenable to same liabilities, turned up, and was applied, causing a surplus. J. and one S. had a contest for said surplus, which in 1882 was adjudged to J. During this contest, C. was neutral, but more than two years after the accrual of his right of action, he, as L.'s assignee, claimed said surplus as part of L.'s assets, because L.'s lands had contributed more than their proportion to satisfy said liabilities. Court below, in 1883, decreed against C. On appeal,

HELD:

1. Decree of 1883 could not be reversed without disturbing decree of 1876, affirmed by dismissal of appeal.
2. Suit by assignee for said surplus was barred by lapse of two years before suit brought.

Heard at Richmond, but decided at Wytheville.

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Appeal from decree of corporation court of Danville, rendered at its May term, 1883, in the cause of Gilchrist's administrator *against* Howard Craft's administrator and als., dismissing the petition or bill of Cobbs, assignee of Lydia Craft, bankrupt, claiming a certain surplus as part of the bankrupt's estate.

Opinion states the facts.

E. E. Bouldin, for appellant.

Peatross & Harris, and *Green & Miller*, for the appellees.

RICHARDSON, J., delivered the opinion of the court.

This is a controversy as to who is entitled to a certain fund remaining in the hands of the receiver in the suit of Cole, adm'r of Gilchrist, against one Young and Howard Craft's adm'r, brought many years ago in the circuit court of Pittsylvania county, and there prosecuted until removed to the corporation court of Danville. The object of that suit was to avoid, for fraud, a contract and conveyance by Gilchrist to Young, of certain very valuable real estate in Pittsylvania county, Virginia, and in the state of Kentucky, which conveyance was fraudulently procured by a corrupt combination between said Young and Craft, the product of which fraudulent conspiracy was divided between them. The suit was successfully prosecuted, the swindle exposed, and the contract annulled by a decree entered in the cause, which decree was appealed from and was affirmed by this court in 1873. The cause was then sent back to the lower court for further proceedings to be had therein. Much of the land acquired from Gilchrist by Young and Howard Craft, by and through their fraudulent combination aforesaid, had passed into the hands of innocent parties, and could not be made available to reimburse the estate of Gil-

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christ, so it became necessary to look for reimbursement to the estates of Young and Howard Craft.

Howard Craft died seized in fee of a large estate, real and personal, which he devised jointly and equally to his wife, Lucy D. Craft, and to his son and only child, Johnson Craft. Subsequently, in a suit for the purpose, partition of said estate was had in obedience to a decree rendered in said last named suit in 1858. After said partition had been made and confirmed, Lucy D. Craft went into bankruptcy and surrendered the land partitioned to her, except a small portion which she had aliened. Upon proceedings taken therein for the purpose, the lands surrendered by Lucy D. Craft were, by order of the bankrupt court, stricken from her schedule of property surrendered, and submitted to the jurisdiction and disposition of the state court, in said suit of Cole, adm'r of Gilchrist, *vs.* Young and Howard Craft's representative, &c. After said suit went back to the circuit court of Pittsylvania, with the view of reaching and charging the estates of Young and Howard Craft with the liability incurred by them by reason of the fraud which they had perpetrated upon Gilchrist, the bill was amended, the necessary facts set forth, and all necessary parties made; and the appellant Cobbs, assignee of Lucy D. Craft, was made a party to said amended bill. This was in 1875. In the meantime, the cause was removed to the corporation court of Danville, wherein all subsequent proceedings were had. For the purposes of this controversy, no further mention need be made of Young or his estate, as the fund in question is part of the proceeds of the Craft lands sold in said suit.

In the suit of Gilchrist's adm'r *vs.* Young and Howard Craft's estates, such proceedings were had that by a decree rendered in February, 1876, a very large liability was fixed upon the estates of Young and Howard Craft. That decree ascertained and apportioned the liability of the devisees of Howard Craft; held that all the lands devised by said Howard Craft to Lucy D. and Johnson Craft, were liable to Gilchrist's

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estate, except certain parcels designated which had been aliened; decreed that all the lands so liable would be necessary to discharge said liability, and directed a sale of the whole, so liable, except a tract of 290 acres derived by Johnson Craft under the will of Howard Craft, and by Johnson Craft sold and conveyed to Joab Watson, as to which the court, being in doubt then as to the liability thereof, reserved its opinion. This decree of 1876, also expressly ascertained and fixed the order of liability of said Craft lands,—the lands of Lucy D. Craft (except two small parcels thereof which she had conveyed), and a certain tract of 211 acres derived by Johnson Craft under the will of Howard Craft, being declared to be *first liable*; the other lands of Johnson Craft, subjected by said decree, are expressly put in the class *second liable*.

The decree of 1876, thus apportioning and fixing the order of liability of the Craft lands, was appealed from, and the appeal regularly docketed in this court, which appeal was dismissed on the 6th day of November, 1878.

All the lands thus decreed to be sold were sold, and the purchase money came into the hands of the court's receivers.

In 1877, unexpectedly, a very considerable personal fund, belonging to Howard Craft's estate, was realized, and hence the balance, arising from the sale of the Craft lands, now in dispute.

When it was ascertained that this surplus existed, John O. Shelton, the purchaser from Johnson Craft of a tract of land (a part of that devised by Howard Craft), which had been subjected and sold under said decree of 1876, filed his petition in said suit claiming, that as said fund was needed to satisfy the liability of Howard Craft's estate, he (Shelton) was entitled thereto.

This petition was answered by Johnson Craft, denying Shelton's claim, and insisting that he (Craft), and his creditor, one Hargrove, were entitled to same. The question was determined at the June term, 1882, when the court rejected the claim of Shelton (and also that of others, who it seems also asserted

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claims thereto), and decreed that Johnson Craft and his creditor, Hargrove, were entitled to said surplus. Cobbs, assignee of Lucy D. Craft, though a party, during this contest stood by without asserting any claim. After the decree of June, 1882, however, Cobbs, to-wit, at the September term, 1882, presented his petition to said corporation court, asking for the reversal of the said decree of June term, 1882, in so far as it directed said fund to be paid to Johnson Craft or his creditor, Hargrove, and that the same be decreed to him as assignee of Lucy D. Craft, on the ground that the lands of Lucy D. Craft had paid more than her share of the liability upon the estate of Howard Craft. The court, being of opinion that the questions suggested should be raised by bill, rejected the petition, but with leave to said assignee to file his original bill. Accordingly, Cobbs, assignee, filed his bill, setting forth more particularly his said claim. Johnson Craft answered, denying any right of the plaintiff, Cobbs, assignee as aforesaid, and relied upon the statutes of limitation, state and federal. And Messrs. Peatross and Harris, and Geo. T. Rison, filed their petitions in this last suit, claiming that they, as attorneys, had liens upon the fund claimed by the plaintiff, Cobbs, as assignee, for services rendered by them for Johnson Craft, in the controversy between him and others in respect thereto. At the December term, 1882, of said corporation court, a commissioner was ordered to report the facts and circumstances connected with the contract and alleged lien of said attorneys. The commissioner reported adversely to said claim. This report was excepted to: and at the May term, 1883, of said court, the two causes came on and were heard together, when the court sustained the exceptions to said report, and dismissed the bill of Cobbs, assignee. The case is here on appeal from the decree rendered at the June term, 1882, and the decree rendered at the September term, 1882, in the suit of *Cole, adm'r of Gilchrist v. Young and Howard Craft's adm'r*, and from the decree rendered at the May term, 1883, in the suit of *Cobbs, assignee, v. Johnson Craft & others*.

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The court is of opinion that there is no error in the decrees appealed from, or either of them. The real question is a narrow one, and depends upon the effect of the decree of February, 1876, in the suit of *Gilchrist's adm'r v. Young and Howard Craft's adm'r*, which decree was appealed from, and the appeal dismissed after the same had been regularly docketed in this court. By section 18, chapter 178, Code 1873, it is provided that "after the dismissal of an appeal, writ of error or *supersedeas*, no other appeal, writ of error or *supersedeas* shall be allowed to or from the same judgment, decree or order." There is much contention whether that (the decree of 1876) was or not a final decree. For the purposes of this case it is not necessary to decide that question. It is enough to say that, under the circumstances, it has all the effect of a final decree. It apportioned the liabilities of Howard Craft's devisees. It made all the lands of Lucy D. Craft, with only one of the tracts held by Johnson Craft *first liable*; all the other lands of Johnson Craft are in the classes held *second* and *third liable*. This being so, and that decree, settling this vital principle, having been appealed from and the appeal regularly dismissed, and no longer subject to be appealed, it is in effect final, and forever concludes all parties as to the principles thereby settled. It has been seen that the appellant from the start has rested his claim upon his right to contribution from this fund upon the ground that the lands of Lucy D. Craft paid more than her share of the liability upon Howard Craft's estate. That her lands paid more of the liability than the lands of Johnson Craft did, is doubtless true; but that is the result of the decree which made her lands *first liable*, and thereby cut off all claim on the part of her assignee to contribution. The right to contribution arises, ordinarily, when two or more persons jointly owe a debt, and one is compelled to pay the whole of it, the others are bound to indemnify him for the payment of their shares; this indemnity is called a contribution. 2 Bour. Ins. 79; 1 Bour. L. D. 359, and authorities cited; Adams' Eq. 267 (side). From these au-

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thorities it is plain, that in numerous cases courts of equity will compel contribution if the relations of the parties are such that justice requires it at the hands of the court. On the other hand, in the absence of such relations, the right does not exist and cannot be enforced. No such relation existed between these parties. True, Howard Craft devised his lands to them jointly and equally, but partition had been made between them, and they held in severalty, when by the decree of 1876, the lands thus held were changed, and the order of liability fixed. This court has no authority now to enquire into the propriety of that decree; it was appealed from and the appeal was regularly dismissed; and that dismissal precludes all inquiry by this or any other court, into that and all previous decrees in the cause. This view seems to be thoroughly sustained by the reasoning of the judge delivering the opinion of this court in *J. B. Campbell's ex'ors v. A. C. Campbell's ex'or*, 22 Gratt. 649. Moncure, P., delivering the opinion in that case, at page 672, said: "The case made for the court of appeals by an appeal from a decree of the court below, whether final or interlocutory, is, as to the court of appeals, a complete case in itself, and the decree of that court therein is final and conclusive between the parties, as well upon the court itself as upon the court below; and the court of appeals can do nothing more in the course of the same litigation, until a new and different appeal is brought up to it from some decree of the court below, rendered in the cause upon subsequent proceedings in that court; and then the court of appeals can only review and reverse that decree without interfering with its own former decree."

Here, it is true, only decrees subsequent to that of 1876, are appealed from; but to reverse the decrees complained of would be, in effect, to review and reverse said decree of 1876, which fixed the order of liability of the lands of Lucy D. and Johnson Craft, and thereby precluded the appellant's claim as assignee of Lucy D. Craft. By force of the statute, (§ 18, ch.

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178, Code 1873,) the order of this court, dismissing the appeal from the decree of 1876, has, for all practical purposes, precisely the same effect as that of a decree of affirmance. Otherwise, the statute is of no effect whatever.

Again, the appellant, as assignee of Lucy D. Craft, at the inception of this proceeding by him, stood precluded and was barred of his claim by the federal statute prescribing the time within which, after the right of action has accrued, proceedings by or against assignees in bankruptcy shall be commenced. The policy of the bankrupt law is speedy as well as equal distribution of the bankrupt's assets among his creditors. Hence the clause (§ 5057, R. S. U. S.), limiting the commencement of actions by and against the assignee to two years after the right of action accrues, applies to all judicial contests between the assignee and any person whose interest is adverse to his. Such was the ruling of the Supreme Court of the United States in *Bailey v. Glover*, 21 Wall. 346; see also *Gifford v. Helms*, 98 U. S. 248; *Jenkins v. International Bank*, 106 U. S. 571.

Here the surplus in controversy was ascertained, by decree in August, 1877; a protracted controversy in respect to it then ensued, and was not determined until June, 1882, during all which period this assignee, the appellant here, though a party to the suit in which this controversy, between others, was being waged, stood by and asserted no claim. This was gross negligence, if he had any claim (and in fact he had none), and, to say the least, strongly indicated that he had no claim, or had abandoned it. That it was his duty to commence proceedings to recover this fund, if he had any just claim thereto, within two years after the decree of 1877, there can be no doubt: and that the right of action, if any, then accrued, is equally clear. He, however, waited for over five years, and until the contest, between others, claiming the fund adversely to him was ended, and then presented his petition, asking that the court reverse and annul its decree settling the question, and decree the fund to him. His

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petition was rightly rejected; and it would have been clearly right had the court refused to entertain his original bill, for same reason, when subsequently presented. In any event, the court rightly dismissed his bill at the hearing. Under all the circumstances, the decrees appealed from, and each of them, are plainly right, and must be affirmed, with costs to the appellees.

DECREES AFFIRMED.

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DAILY'S EX'OR v. WARREN AND ALS.

JUNE 11TH, 1885.

1. **ASSIGNMENTS—Recordation—Case at bar.**—Assignments of choses in action need not in Virginia be recorded. The case here is one of competitive assignments.
2. **PRACTICE IN CHANCERY—Assignors parties.**—Where one files petition in pending cause to assert claim as assignee to debt reported therein, the assignor must be made party to petition and summoned to answer.
3. **IDEM—Review and reversal—Witness.**—Decree directing payment of such debt to such petitioning assignee, will be reversed on petition of the assignor, who has not been made party and summoned to answer. And on hearing of such petition to re-hear, the assignor and a rival assignee are competent witnesses to prove the assignment to the latter and the consideration thereof.
4. **EVIDENCE—Subsequent declarations.**—Declarations made and letters written by assignor subsequent to assignment, are inadmissible as evidence against his assignee.
5. **ASSIGNMENTS—Competitive assignees—Burden of proof.**—Where subsequent assignee claims that he took his assignment for value, without notice of the previous assignment, and that the previous assignment was fraudulent, the burden is, of course, on him to prove the case.

Heard at Richmond, and decided at Wytheville.

Appeal from decree of circuit court of Loudoun county, rendered January 23rd, 1883, in the cause of *Warren v. Lersner*, which was a creditors' suit against the estate of Gustavus Lersner. An account was ordered and taken, and the report showed among other debts, one of \$3900, with interest from May 2nd,

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1876, to Morris Lersner, and secured by trust-deed on lands in Fauquier county. Of this debt, \$1387.78 was assigned to Aaron Daily, on 3rd April, 1877. Daily's ex'or, in April, 1880, filed his petition in said cause, setting up this assignment, and praying that so much of the said debt be decreed to him. To this petition neither Morris Lersner nor Ignatius Lersner was made a party. In October, 1880, a decree was entered according to the prayer of the petition. But Morris Lersner had, on 15th March, 1877, for value received, assigned by an instrument under seal, and acknowledged before a notary, but unrecorded, to Ignatius Lersner, \$1900 of said \$3900 debt, and had delivered the bond evidencing the debt to the assignee. Of this assignment, Daily had notice on 3rd April, 1877, when he took his assignment as security for a debt, which originated from Morris Lersner to said Daily, after 15th March, 1877. Before the money was paid to Daily's executor under the decree of October, 1880, Morris Lersner and Ignatius Lersner filed their joint petition in said suit, setting forth the said assignment of 15th March, 1877, asking that the decree of October, 1880, be reviewed and reversed, and that the payment to Daily's executor be enjoined, and that \$1900 of the said \$3900 debt be paid to the assignee, Ignatius Lersner, in preference to said Daily's executor. To this last petition Daily's executor demurred, and answered, and averred that Daily was an assignee for value, without notice of the previous assignment, which he contended was void, because made with intent to hinder, delay and defraud the assignor's creditors. By the decree complained of, the court below overruled the said demurrer, reversed the decree of October, 1880, and ordered the money to be paid to Ignatius Lersner. It also overruled the exceptions of the depositions of Morris Lersner and of Ignatius Lersner, taken in the cause in their own behalf, to prove the assignment of 15th March, 1877, and the consideration thereof; and sustained exceptions to certain depositions and letters offered by Daily's executor in his own behalf; and it

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also decided that Morris Lersner should have been made a party defendant to the petition of Daily's executor, and summoned to answer. From this decree Daily's executor appealed to this court. The other facts and points raised are stated fully in the opinion.

Harrison & Powell, for the appellant.

E. Nichols and *J. W. Foster*, for the appellees.

FAUNTLEROY, J., delivered the opinion of the court.

In 1872 a lien creditor's suit, under the style of *Warren v. Lersner*, was instituted to enforce the lien upon the real estate held by Gustavus Lersner in the counties of Loudoun and Fauquier. An account was ordered in June 1873. The commissioner returned an account of liens, which was confirmed by the circuit court of Loudoun, in October 1874: and the Loudoun lands were ordered, by the court, to be sold. Part of these lands had been sold, when, in the summer of 1876, the defendant, Gustavus Lersner, died; and the cause was revived against his executor and devisees. In October, 1876, a decree was entered for the commissioner to review and revise his account of liens, and to take further account thereof, as well as of all other debts outstanding against the late Gustavus Lersner.

The commissioner returned his report of debts with their priorities, which was confirmed by the court; and, among them, a debt due to Morris Lersner of \$3900, with interest from May 2d, 1876, and secured by a deed of trust, recorded in Fauquier county, upon the lands of Gustavus Lersner in that county. The lands were all sold, and the liens transferred to the fund in the cause.

Aaron Daily became an assignee for value, of this lien reported in favor of Morris Lersner to the extent of about \$1500, by virtue of various assignments, made from time to time, by

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Morris Lersner during a period running from April 3d, 1877, to May, 1879. In November, 1879, Aaron Daily died; and in April, 1880, his executor (the appellant) filed a petition in the cause of *Warren v. Lersner*, setting out these various assignments by Morris Lersner to his testator, and asking that all dividends on the Morris Lersner debt, reported in that cause, might be decreed to be paid to him until the said assignments should be fully paid.

To this petition Morris Lersner was not made a party, although his counsel suggested to the court that he ought to be made a party defendant to the petition; and the court, upon an inquiry and report from a commissioner as to what part of the interest of Morris Lersner in the cause was covered by these assignments, by its decree of October term, 1880, ordered its commissioner of sale to collect the fund belonging to the cause, and, after payment of costs, to pay the residue to the parties to whom the commissioner had reported it to be due—among others, to the executor of Aaron Daily, as assignee of Morris Lersner, the sum of \$1387.78.

In September, 1881, before the aforesaid order in favor of Aaron Daily's executor had been executed, Morris Lersner and Ignatius Lersner filed their joint petition, asking that the commissioner of sale should be enjoined from paying to Daily's executor the aforesaid sum decreed to him, on the ground that the entire dividend on Morris Lersner's debt was due to Ignatius Lersner, by virtue of an assignment to him, made on the 15th day of March, 1877, eighteen days prior to the assignment to Aaron Daily; and praying that the aforesaid order of October, 1880, in the pending case of *Warren v. Lersner*, in favor of said Aaron Daily's executor, might be reheard, reviewed and corrected; and for general relief. An injunction was awarded by the circuit judge, according to the prayer of the petition. To this petition the defendant, Aaron Daily's executor, demurred and answered, and contended that Aaron Daily was an assignee for value, and without notice of the previous

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assignment to Ignatius Lersner, and was entitled to preference, because the assignment to Ignatius Lersner was made with intent to defraud; and because of the *laches* of Ignatius Lersner in leaving Morris Lersner in the control and apparent ownership of the fund. An order of reference was made to a master commissioner, who reported January 22d, 1882, that the assignment to Ignatius Lersner, by virtue of its proper date, of March 15th, 1877, was entitled to priority over the subsequent assignments to Aaron Daily. To this report appellant excepted; as, also, to the competency of Morris Lersner's and other testimony, taken and filed in the cause.

The court overruled the demurrer to the petition, and overruled the exceptions to the commissioner's report, and to the testimony of Morris Lersner and others; and, by its decree of 23d of January, 1883, confirmed the said report, and ordered the money to be paid to Ignatius Lersner. It also sustained exceptions to certain depositions taken in behalf of appellant; and overruled a motion of appellant for further time to show actual fraud, after the decision of the case by the decree complained of.

This is a competition of assignments, and the only question before this court is the validity and *bona fides* of the assignment of March 15th, 1877, by Morris Lersner to Ignatius Lersner.

We are of opinion that the circuit court did not err in allowing the petition of Morris Lersner and Ignatius Lersner to be filed in the cause, September 10th, 1881, and in overruling the demurrer. No final decree was made in the cause until January, 1883, and in September, 1881, the cause was still pending. By the decrees entered, the rights and questions of subrogation were reserved to any person, and the commissioners of sale were directed to collect and report their proceedings to the court, from time to time, and, if necessary, to bring suit against the purchasers. And in October, 1881, the legal title to the land sold was brought before the court, and a deed to the purchaser was decreed to be made. *Sexton's ex'ors v. Patterson, &c., Va.*

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Law Journal, Feb., 1884, p. 73; *Miller's adm'r v. Cook's adm'r*, 77 Va. (2 Hansbrough) 806; *Ryan's adm'r v. McLeod*, 32 Gratt. 377. None of the several assignments made by Morris Lersner of his interest in the cause were absolute, or embraced his whole interest. Barton's Ch. P. vol. 1, p. 163; *Newman v. Chapman*, 2 Randolph, 93; *James R. & K. Co. v. Littlejohn*, 18 Gratt. 83. It was believed to be a good asset for its full amount of \$3900. Daily's petition, at April term, 1880, brought in *new* matter affecting the interests of Morris Lersner, who had never been a party to the cause pending, and who had no notice of the proceedings had therein before the commissioner, by process or otherwise; and he was a necessary party to the petition of his assignee, Ignatius Lersner; and he ought to have been made a party defendant to the petition of Daily, and been summoned to answer the same. The court saw its error in not making Morris Lersner party defendant to Daily's petition, and awarding process for him to answer it; that he had had no notice of the proceedings before the commissioner in 1880; and that injustice had thus been done both to him and to his assignee Ignatius Lersner. Under the authority of *Wooding v. Bradley*, 76 Va. (1 Hansbrough) 614; *Smith v. Blackwell*, 31 Gratt. 300; it was manifestly proper to allow the petition to be filed. The petition of Morris Lersner and Ignatius Lersner was filed in a pending cause to correct error hurtful to their interest, in proceedings to which they had not been parties, and of which they had no notice. In such cases the court will look at the real essence of the claim and correct injustice. So long as a case remains, or is retained on the docket, the court may receive exceptions to commissioner's report, even after its confirmation, if it be clearly shown that, if carried out, the report will work injustice. *Wooding's ex'ors v. Bradley's ex'ors*, 76 Va. (1 Hansbrough) 614-16. The condition of the record, when, in 1881, the Lersners, Morris and Ignatius, filed their petition, showing that they, then, for the first time, knew of the petition filed by Aaron Daily's executor, and the proceedings had under the de-

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cree of April, 1880, by Commissioner Powell; the fact that the decree of October, 1880, had not been executed by the paying over the money by the commissioner of sale; that neither Morris Lersner nor Ignatius Lersner had been made a party to Daily's petition, nor had been summoned to answer, or affected with notice of it, or of the proceedings had by commissioner under the decrees of 1880, by personal service or otherwise, leaves no doubt of the sufficiency in law of their petition to rehear and correct the error and injustice of a decree which gave to other and junior assignees \$1520.73 of a fund to which Ignatius Lersner was entitled, by virtue of his prior assignment of March 15, 1877.

The court did not err in overruling the exceptions to the deposition of Morris Lersner and of Ignatius Lersner. The questions raised and put in issue by the petition and pleadings were never before the court, and presented original or new matter of controversy. The deposition of Morris Lersner was allowed to stand only in regard to the consideration and execution of the \$1900 assignment; and all facts in relation to the \$600 item (which is not before the court, and is immaterial to the main and controlling question) were suppressed. Ignatius Lersner was clearly a proper and competent witness as to the consideration and execution of the said assignment and want of notice of Daily's petition, and of the proceedings by the commissioner under the decree of April, 1880.

The court did not err in sustaining exceptions to appellant's depositions. They were allowed to be read for the purpose of impeaching the credit of Morris Lersner; but they fail to do this. The deposition of Henry Harrison relates entirely to the \$600 item, and refers to things which occurred after March 15th, 1877, out of Ignatius Lersner's presence, and is wholly irrelevant to the controversy in regard to the \$1900 assignment. John Carr's letter to Harrison & Powell, attorneys, in 1881, is subject to the same objection. C. K. Harrison's affidavit embraces only sundry letters written to him by Morris Lersner,

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June, 1878, etc. No matter what Morris Lersner wrote to him after March 15th, 1877, as there is no pretence that Ignatius saw or authorized them, they are not evidence against him. This affidavit and these letters were injected into the records April 24th, 1882, after Morris Lersner had been twice examined, without calling his attention to them, or giving him an opportunity to show under what circumstances and why they were written. L. H. Powell's depositions were properly objected to, because they detail matters which occurred out of the presence of Ignatius Lersner, after March 15th, 1877, and conversations with Morris Lersner in 1878, '79, '80 and '81; and with Aaron Daily, out of the presence of both Morris Lersner and Ignatius Lersner. "Declarations of an assignor after assignment are inadmissible in evidence against his assignee." *Barbour v. Duncanson*, 77 Va. (2 Hansbrough) 76-83; *Smith v. Betty*, 11 Gratt. 752-764.

According to the rule laid down in Greenleaf's Evidence, 12 edition, sections 461-466, the evidence of L. H. Powell and of C. K. Harrison was inadmissible; and that of John Carr's letter and Henry Harrison's deposition are irrelevant, and none of them evidence against Ignatius Lersner. The answer of Daily's executor upon its face, discloses that he, of his own knowledge, knows nothing of the case stated in Lersner's petition, and therefore has not the weight of a responsive answer.

On the 15th day of March, 1877, Morris Lersner, in the city of New York, did assign, transfer and deliver to Ignatius Lersner, of Paris, France, the bond of Gustavus Lersner, payable to him, Morris Lersner, dated May 2d, 1876, at twelve months after date, secured by a deed of trust on his Fauquier lands. The said assignment was in writing, under seal, duly acknowledged before a notary public on the same day. Morris Lersner was about to return to Virginia, and Ignatius Lersner to Paris. The execution of said assignment and the delivery of the bond itself to the assignee, Ignatius Lersner, are proven by the notary public, by Ignatius Lersner, by Morris Lersner and by Emil Lers-

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ner, who wrote the assignment. Ignatius Lersner took and held the said bond for \$3900, with a covenant in the contract of assignment, to re-assign and surrender the said single bill of \$3900 to the party of the first part, if and when the said Morris Lersner shall well and truly pay to said Ignatius Lersner out of the proceeds of sale of said real estate above described, or otherwise, the just and full sum of \$1900, with seven per cent. per annum interest, from 1st day of January, 1874, till paid. Morris Lersner was divested of the possession, control and ownership of the said bond, and did not even have a copy of it; while the deed of trust by which it was secured was recorded in Fauquier county.

As to the consideration for the said assignment to secure the payment of the said \$1900, with interest, to Ignatius Lersner, and its *bona fides*, there can be no doubt, or room for question. In 1874, Morris Lersner, who was then indebted to Ignatius Lersner for advances made, as per account entered and stated in memorandum books shown in the record, closed those accounts by the execution and delivery of his *due-bill* March 2d, 1874, for the ascertained and stated balance of \$1831.68. He was not then indebted to anyone else, so far as the record shows; and, assuredly, not indebted to, or having any relation of business with, Aaron Daily, whose specific claim, asserted in this controversy, took its inception April 3d, 1877, the date of his assignment.

In March, 1877, Ignatius Lersner was about to go to Paris, France, and he and Morris Lersner met in New York, and made a settlement of their business affairs with themselves, the old *due-bill* being surrendered, and Morris executing and delivering therefor the formal written assignment of March 15th, 1877, of the \$3900 bond due to Morris by the estate of Gustavus Lersner, to secure to him the payment of \$1900, with interest at 7 per cent., from January 1st, 1874, upon the terms and covenants contained in the said written assignment to re-assign and surrender back to Morris Lersner the said bond or

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single bill upon the payment to him by Morris of the said debt secured by the said assignment, with condition of defeasance.

This assignment of March 15th, 1877, by Morris Lersner to Ignatius Lersner, was neither fraudulent in fact nor in law. The debt secured to Daily by the assignment made to him April 3d, 1877, was not in existence on March 15th, 1877; and the record shows, beyond debate, that on April 3d, 1877, Powell Harrison, the attorney for Daily, who wrote the assignment in his favor, believed, as the approved reports of the master commissioner in the cause showed, and as Morris Lersner believed, and had no reason to distrust, that the proved and reported debt due to Morris Lersner in the cause, was good for its full face amount, and would be paid in full out of the proceeds of sale of the Fauquier lands, upon which it was secured by deed of trust. It was not necessary for Ignatius Lersner to aver in his petition, that Daily, on April 3d, 1877, when he took his assignment, had notice or knew of the assignment to him of a part of the fund due, in the cause, to Morris Lersner. He could stand, and does now stand, upon the rock of his *priority* of assignment, and the delivery to him, and his possession of, the bond itself for \$3900. Daily's executor, in his answer avers, affirmatively, that Aaron Daily, his testator, took his assignment of April 3d, 1877, without notice of the prior assignment; and this is a part of appellant's case, *not appellee's*; yet, the record does show, by the evidence of A. J. Lersner, that Morris Lersner, on April 3d, 1877, in the presence of Aaron Daily, stated to Powell Harrison, attorney for Daily, that he had already assigned \$1900 of the claim to Ignatius Lersner, and that only \$2000 of the debt was left. The bond itself, evidencing the debt, was not in the possession of Morris Lersner; and it is not to be presumed or believed that Powell Harrison, acting as adviser and attorney for Aaron Daily, and writing the assignment in his favor, would have failed to ask for the bond, and to require it to be filed and delivered along with assignment to Daily, unless he and Daily both knew of the assign-

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ment of \$1900 of its value, and its delivery to and possession by Ignatius Lersner. The record leaves no room for doubt, that Harrison and Daily, and the commissioner of the court, and Morris Lersner, then confidently believed that the claim of Morris Lersner for \$3900 would be paid in full, and a large surplus of the proceeds of sale of the Fauquier lands be left for satisfaction of subsequent lienors.

The charges of *laches*, secret trust, and fraud, are not only not proved, but are disproved by the record. Ignatius Lersner was absent, in Paris, and when at home, in New York; and this claim, partly assigned to him, could only be paid out of the last payment for the land sold, which was not due until October, 1881. The rule *carcat emptor* applies to assignee of choses in action, and especially when, as in this case, the assignor has not the chose in possession to deliver to the assignee. *Brown v. Taylor's committee*, 32 Gratt. 138. In this case there was no possession of the bond assigned and delivered by Morris Lersner to Ignatius Lersner, March 15th, 1877, nor of the lien, for that was recorded in Fauquier. Morris Lersner regarded it as a good asset, and so did Powell Harrison; and Ignatius Lersner was in no wise privy to any of the assignments made to Daily; and he, Daily, took them with actual as well as presumptive notice of the prior assignment and delivery of the bond to Ignatius Lersner to secure his claim for \$1900. The failure to produce the bond assigned was notice, presumptive, to Aaron Daily and to P. Harrison, his attorney, of its being out of Morris Lersner's possession, and put them upon inquiry. 2 Minor Inst. 889. "A subsequent purchaser is charged constructively with notice of all facts and instruments, to the knowledge of which he would have been led by an inquiry into the incumbrance, or other circumstance affecting the property, of which he had actual notice." Daily had actual knowledge that there was a bond in this case, and so had Powell Harrison, for the very assignment which they wrote and took April 3d, 1877, so states. By no word, or act, or conduct, of Ignatius Lersner,

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was Aaron Daily induced or led to take the assignment of April 3d, 1877. He was not present, and never heard of it until 1881.

We do not think the court erred in overruling the motion for further time to show actual fraud, made after the decision of the case. It had been pending since September, 1881, and all the proofs, on part of appellee, had been filed as early as April, 1882, nine months before the court decided the cause. Appellant had charged fraud, and want of notice of previous assignment; and, as his own case, he was bound to prove it. He had ample time, and submitted the case to the judgment of the court, as a whole; and the statement upon which he based his motion for further time, or, in fact, a new trial, made no pretence of new matter, and it was not sworn to by anyone.

There was and is no law in Virginia, requiring the assignment of a chose in action to be recorded, and if recorded it would not affect any one with notice. 2 P. & H. 178; *Gregg v. Sloan*, 76 Va. (1 Hansbrough) 497; *Kirkland, Chase & Co., v. Bruce*, 31 Gratt. 126; *Bickle v. Chrisman, &c.*, 76 Va. (1 Hansbrough) 678. Assignee of chose in action is not required to do more than take possession of the thing or evidence of debt assigned. After careful and critical comparison of the facts of this case with the facts of the cases cited by appellant, *Davis v. Turner*, 4 Gratt.; *Curd v. Miller*, 7 Gratt. 185; and *Thrine's case*, we find no analogy or proper application to the case under review. Some of the cases cited were controversies concerning title to real property; and, in all of them, the assignor, or vendor, retained possession of the thing sold or assigned.

We concur in the judgment of the circuit court of Loudoun county, and the decree complained of must be affirmed.

DECREE AFFIRMED.

Wytheville.

BARNES v. TRAFTON.

SAME v BERRY.

JUNE 11TH, 1885.

1. PRACTICE IN EQUITY—*Guardian and sureties*.—In suit against guardian and his sureties by ward, a joint decree may at once be rendered against them on their official bond, without exhausting the guardian before going on his sureties.
2. EQUITABLE JURISDICTION AND RELIEF—*Wife's land—Joint sale—Trust*. Where wife joins with husband in conveying her land on condition that proceeds be applied to payment of a debt binding her children's land, a trust is thereby created, which a court of equity will enforce against husband, though the bonds for said proceeds be made payable to him.

Heard at Richmond and decided at Wytheville.

Appeal from two decrees of the circuit court of Princess Anne county, rendered in the cause of Mary S. Berry, infant, by her next friend, against William A. Barnes, guardian, and his sureties on his official bond,—and in the cause of Isaac B. Berry, infant, by his next friend, against the same. The first cause was revived in the name of John W. Trafton and wife as complainants, upon the intermarriage of Mary S. Berry with him. The object of the suits was to surcharge the accounts of the guardian, and to recover the amounts respectively due his wards. The mother of these wards, was the wife first of

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their father, Zebulon Berry, and some years after his decease, of Barnes, their guardian.

There remaining a debt of her first husband, binding the lands descended from him upon the said wards, and their mother owning a tract of land in North Carolina, consented to join in a conveyance of said land with her husband, the said Barnes, on condition that the proceeds be applied to extinguish that debt and relieve her children's lands. The bonds for the proceeds were taken payable to Barnes, but remained at the time of the decrees complained of, in his hands. The cause was referred to a master to take, settle and report the guardian's accounts. The account was taken, and the report showed that after allowing the guardian reasonable compensation for the board and clothing of his wards, and credits for proper disbursements for repairs and improvements on the wards' lands, and for payments made on the said debt, and charging him with the rents of their said lands and the proceeds of the said North Carolina lands, their remained due to Mrs. Trafton the sum of \$583.57, and to Isaac B. Berry the sum of \$495.86, with interest on both sums from March 2, 1876. There were exceptions to this report. The circuit court allowed the guardian two credits, which reduced the amount due to Mrs. Trafton to \$466.21, with interest as before, and overruled the exceptions, confirmed the report, and gave the complainants decrees for the said amounts and interest respectively, with costs. From these decrees, Barnes, guardian, and his surety appealed to this court.

Opinion states the case.

Walke & Old, for the appellants.

Starke & Martin, for the appellees.

RICHARDSON, J., delivered the opinion of the court.

These were suits in equity in the circuit court of Princess

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Anne county, brought in February, 1876. The first named suit was originally brought in the name of Mary S. Berry, an infant, by T. S. Berry, her next friend, against her gaurdian, William A. Barnes, and his sureties, and pending the suit the said Mary S. Berry having become of age and intermarried with John W. Trafton, the suit was thereafter, by order of court prosecuted in the name of said Trafton and wife. The other suit was brought and prosecuted in the name of Isaac B. Berry, an infant, by T. S. Berry, his next friend, against the same parties. These two plaintiffs are brother and sister, and the wards of said William A. Barnes. The object of each suit was to surcharge and falsify the *ex parte* settlements of said William A. Barnes, as guardian of said plaintiffs, and to recover the amounts respectively due to them.

Except in one not very material respect, which will hereafter be referred to, the questions arising in the two cases are identical, and the two cases, with the exception referred to, will be treated by reference to the first named case of *Barnes et al. v. Trafton and wife*.

The facts are these: Zebulon Berry died in the county of Princess Anne, in February, or March, 1862, leaving a widow and three infant children, Mary S., Isaac B., and Jane, the latter having died in the year 1865, leaving the said Mary S., and Isaac B., the only surviving children, and they are the aforementioned original plaintiffs and appellees here.

At the time of his death, Zebulon Berry was the owner of a farm in Princess Anne county, which descended to his said children, subject to the widow's dower, which, however, was not assigned to her until 1872, some ten years after her husband's death. Mrs. Berry qualified as the administratrix of her husband, who left also a considerable personal estate, from the proceeds of which there went into the hands of Mrs. Berry, as administratrix, the sum of \$2,219.99.

From the death of her husband until the death of her youngest child, Jane, in 1865, Mrs. Berry lived on the farm of

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which her husband died siezed, with her children, and with the two surviving children continued so to live, until December, 1867, when she intermarried with the said William A. Barnes, and for several years after the said marriage, Mary S., and Isaac B., lived with said Barnes and their mother, on a farm in said county owned by Barnes. At the time of the marriage of their mother with said Barnes, the children, Isaac B., and Mary S. Berry, were respectfully eleven and nine years old.

On the 2d day of March, 1868, William A. Barnes was appointed by the county court of Princess Anne, and qualified as the guardian of said Mary S. and Isaac B. Berry. In May of the same year, John H. Dey, a commissioner of said county court, reported thereto what purported to be a settlement of the account of William A. Barnes, as guardian of Mary S. Berry, for the period from December, 1865, to March 2d, 1868, the day of his appointment as guardian, the so-called settlement covering a period, for no part of which was Barnes really the guardian of said children. By this clearly unauthorized settlement, which was, without authority of law, confirmed by the said county court, a large portion of the principal of Mary S. Berry's interest in the personal estate of her father, Zebulon Berry, was consumed. This result was brought about in this way: By a settlement in March, 1863, of the accounts of Mary Ann Berry, the widow and administratrix of Zebulon Berry, there was due from her, as administratrix, to said estate, the sum of \$2219.99, as of March 7th, 1863. This appears to have been the only settlement of her accounts as administratrix. The youngest child, Jane Berry, having died in tender years, after this settlement, but before the marriage of Mrs. Berry with the appellant, Wm. A. Barnes, the two surviving children, Isaac B. and Mary S. Berry, would naturally seem to be the only remaining distributees; the fair inference being, that the widow, Mrs. Berry, took her part of the personalty as authorized by law. But of this the record contains no positive information. In fact, in the absence of any appraisement or sale bill, or any direct evidence upon the sub-

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ject, we are permitted to infer that Mrs. Berry, the widow, did not receive her share independent of said balance found due from her to the estate, and that she was entitled to one-third thereof; a view which all the parties to the controversy seem to acquiesce in.

Thus, the amount of \$2219.99, stood for distribution between the widow and two surviving children of Zebulon Berry, subject to any debts due from the estate; and there were some debts remaining unpaid, which will hereafter be referred to.

The appellant, Wm. A. Barnes, on his marriage (or very soon thereafter) with the widow of Zebulon Berry, became the regularly appointed guardian of said Berry's children, duly qualified, and as such, entered into bond before said court in the penalty of \$2000, with Whitehurst Barnes and Daniel Dozier as sureties, the last named of said sureties having departed this life, and James E. Bell being his personal representative. Said Barnes was appointed guardian on the 2d day of March, 1868; in a very short time thereafter he procured from a commissioner of the court an *ex parte* settlement of what purports to be an account of the transactions of said Barnes as guardian of said children from March 20th, 1865, to March 2d, 1868, all this period being prior to his appointment as guardian, and for no part of which had he any control over either the persons or estates of these wards. But, recognizing that on her marriage with him, Mrs. Berry's powers as administratrix ceased, and that he (Barnes) became charged with her fiduciary liabilities, he goes before a commissioner of the court and succeeds in having a settlement stated and reported, in which for the period, all of which is prior to his authority as guardian, he has charged against this ward (Mary S. Berry) for and on account of disbursements to her charge, by him as her guardian, amounting to \$544.71. Then he ascertains (exactly how, does not appear) this ward's interest to be \$995.32, from which, after subtracting said aggregate of charges, \$544.71, there only remained due this ward the sum (as per this mode of accounting)

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of \$450.61. By thus assuming to be guardian for a period when he was not, and by the mode of accounting just stated, Wm. A. Barnes is relieved of the larger portion of his liability, even before he had the right to open an account with his wards. On the same basis, but subsequent to his appointment as guardian, Wm. A. Barnes had two other settlements before a commissioner of the court, one on the 24th of September, 1873, and the other on the 3d of June, 1875, by the last of which we have this result—this ward's interest in the personalty swept away, and she made to appear in debt to her guardian and step-father in the sum of \$108.22, as of March 2d, 1875. These settlements were in the usual way confirmed by the court without exceptions thereto.

The only outstanding liability of the estate was a debt of \$500 (known in the record as the Grundy debt), which, with interest accrued, had well nigh doubled when discharged. This debt, Mrs. Berry (then Mrs. Barnes), was anxious to discharge out of her own means, and to that extent preserve the estate of her first husband (Berry) to her children by him, to-wit, the said Isaac B. and Mary S. Berry. Mrs. Barnes, either before or after her marriage with William A. Barnes (it is not material which), had acquired by inheritance from a relative certain real estate in the state of North Carolina. She joined with her husband in the sale and conveyance of certain of the North Carolina lands to W. S. Berry, at the price of \$700, with the agreement and understanding that the proceeds should be applied to said Grundy debt, and to that extent preserve the estate of her Berry children. The purchase money bonds were taken by Barnes, payable to himself. Barnes, it seems, had, on first of December, 1869, out of moneys belonging to the estate, paid \$500 on the Grundy debt; and later, Barnes either turned over certain of the notes for the North Carolina land, or other notes in lieu thereof, amounting to about \$450, in payment of the balance due on said Grundy debt. This transaction was negotiated by T. S. Berry, who thus lifted the Grundy note and de-

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livered it to Barnes endorsed, "paid in full by W. A. Barnes, adm'r *d. b. n.* of Zebulon Berry, dec'd." In the second *ex parte* settlement above referred to, that of September 24th, 1873, and the first after Barnes really became guardian, this ward, Mary S. Berry, is charged, as of December 4th, 1869, with her third of payment then made on Grundy debt, \$100. There is a discrepancy in dates and amounts, and the guardian claiming to have paid \$500 on this debt, December 1st, 1869, while in the *ex parte* settlement the ward is charged as of December 4th of same year with only \$100, her third of payment then made; and there is no other charge against the ward on account of any payment made by guardian in December, 1869, nor is it pretended that the guardian, at or about that time, made any other than the alleged \$500 payment on December 1st, 1869. Then, in said account as of March 1st, 1872, this ward is charged for her third of balance then paid on Grundy debt \$155.40. But nowhere are these wards credited with the proceeds of the North Carolina land, as intended by their mother, Mrs. Barnes, in making sale of same.

In this state of things Mary S. Berry, by her next friend, Tolman S. Berry, filed her bill against William A. Barnes, her guardian, and Whitehurst Barnes, his surety, and James E. Bell, the personal representative of Daniel Dozier, deceased, who was the other surety, setting forth substantially the facts as above, alleging specifically matter of surcharge and falsification going to the entire first *ex parte* settlement, covering the period when William A. Barnes was not her guardian, and extending to nearly every item in said two subsequent settlements, the bill charging that the same were false, fraudulent and extortionate.

William A. Barnes answered. Neither of the other defendants, (on whom process was duly served), appeared or answered, and the bill was taken for confessed as to them.

William A. Barnes, by his answer, after setting forth sundry matters wholly irrelevant to the real questions at issue, ad-

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mits that he went before the commissioner and had said *ex parte* settlements (A. 1), but denies that the same is false, fraudulent or extortionate in any particular; and insists that the same (as well as the two subsequent settlements, resulting in said balance in his favor), having been confirmed by the court, are valid and binding.

The cause having been matured, an account of the guardianship transactions of William A. Barnes was ordered, which account was accordingly taken and reported by a commissioner of the court, John J. Woodhouse, the commissioner taking and returning with his report a large mass of depositions as the basis thereof, all of which depositions were taken under the eye of counsel on both sides, and every point contested with marked pertinacity. The commissioner, guided by the evidence, reports a balance due this ward, (Mary S. Berry), as of March 2d, 1876, of \$583.57. In directing this account the decree expressly required said guardian to lay all his vouchers before the commissioner. In this respect, as well as to the means by which the commissioner arrived at the result reported by him, the commissioner says: "That, as said Wm. A. Barnes failed to lay before him his vouchers, he had to be governed solely by the accounts which had been rendered by the said Barnes before the county court, and the depositions taken in the cause. In the account made up by Com'r Dey, on the 13th day of May, 1868, (a copy of which is herewith filed, marked No. 1,) on the credit side of said account, the amount of said account of \$961.99, is an error, it should have been \$854.56. The items for rent for the years 1863, 4, 5, 6 and 7, your commissioner considered too low. He also allowed the ward credit for rent for the year 1862, because the sale of the chattel property of Zebulon Berry, dec'd, took place in the month of March of that year, and the ward should have been allowed her share of the rent for that year. On the debit side of said account the item of \$10.12, paid Jno. P. Woodhouse and Dr. Burky, and the item of \$48, ward's share of board and clothing for deceased

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sister, Jane E., should have been charged one-third instead of one-half, and the board should only have been charged for 1864, and at \$3 per month. The item of \$288, for board and clothing furnished ward, should have been \$180. See memorandum made by Mrs. Barnes, formerly Mrs. Berry, and filed with the said Wm. A. Barnes' deposition.

"In account marked No. 2, the items of \$8.50, \$10.08 and \$13.58, for ditching, your commissioner is satisfied from the deposition of Andrew Laud, a witness for the defendant, taken as to the length and width of the ditches on the Berry farm, that the commissioner made an error by charging the ward one-half instead of one-third of the whole amount. The item of \$43.50, for cutting large ditch, your commissioner considered also to be an error, the mistake being the same as the items for ditching (see deposition of Wm. A. Dowly, and copy of agreement between Z. Berry and others). The item of \$100, December 4th, 1869, and the item of \$155.40, March 1st, 1872, paid C. W. Grundy, your commissioner rejected, because the evidence shows that the said indebtedness was paid from the proceeds of the sale of the lands of Mrs. Barnes, formerly Mrs. Berry, with the express understanding that the amounts should not be charged against her Berry children, her object as stated by her, being to save the Berry land for them."

"On the credit side of said account, the amount of \$25.50, for rent of 1872, is an error, and had it been stated correctly, your commissioner is of opinion that \$25 would be too small. It appears from the depositions, that in the fall of 1871, the said Wm. A. Barnes, as guardian of the said Mary S. Berry, and her brother, Isaac B. Berry, put up before the court-house of this county, the Berry farm for rent for the year 1872; at said renting there were heavy restrictions to be complied with by the rentor, and the farm was knocked down to Andrew Laud, who, it appears, bid it off for Mr. Barnes, the guardian, at the price of \$50; the said restrictions were not complied with, and the farm was held by said Barnes at the same price for the years

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1873 and 1874; and as the said farm rented for \$100 the next time it was put up, your commissioner considered that the ward should have her share of the rent for said years at the rate of \$100 per year."

"In account marked No. 3, on the debit side of said account, the items of \$5.64 and \$8.47, for taxes; the item of \$6.97, for timber and nails; the item of \$9.25, for ditching; the item of \$3, paid commissioners to lay off land; the item of \$14.17, for ditching; the item of \$6.66, for taxes; and the item of \$1.24 paid clerk Edwards, are errors, they should have been charged one-third, instead of one-half."

Thus, in the language of the commissioner himself, we have the result arrived at, and his reasons therefor, based on the evidence taken before him and returned with his report; the commissioner throughout referring to the errors in the *ex parte* settlement and correcting them, as well against as in favor of the guardian; his disallowance of improper charges against said ward, and his allowance to her of larger rents than had been allowed in said *ex parte* settlements.

To this report of the commissioner, the defendant, Barnes, by counsel, endorsed thereon several exceptions, all of them voluminous, and in the main, more in the character of arguments to show why the commissioner should not have departed from the *ex parte* settlement, than exceptions proper.

At the hearing, the circuit court overruled all of said exceptions, but allowed two credits, with interest thereon, which had not been allowed by commissioner Woodhouse, the result of which was to reduce the balance in favor of this ward from \$583.57 to \$466.21, as of the 2d day of March, 1876, and so modified, the report was confirmed, and a decree entered for said sum of \$466.21, with interest from 2 March, 1876, against said Wm. A. Barnes and his surety, Whitehurst Barnes, and the defendant, James E. Bell, the personal representative of Daniel Dozier, the deceased surety of said Barnes, out of any assets of his intestate in his hands, and costs.

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From this decree, Wm. A. Barnes, and his surety, Whitehurst Barnes, obtained an appeal to this court; and while separate decrees were rendered in the two suits, (in the suit of Isaac B. Berry against the same parties, the decree being for \$495.86, with interest from the 2d of March, 1876) the same questions are raised by the pleadings, and both cases turn upon the same evidence.

The appellants' first assignment of error is, that the decree is against Wm. A. Barnes, the principal, Whitehurst Barnes, his surety, and James E. Bell, personal representative of Daniel Dozier, the deceased surety; whereas it is insisted, the decree should have been only against Wm. A. Barnes, with recourse over against the sureties, in case their principal did not pay the money as directed. For this proposition counsel cite *Lacy v. Stamper et al.* 27 Gratt. 42, but admit, that in that case the court made an exception to the general rule. It must be remarked, however, that the case did not sustain the view taken by counsel. There is nothing in the objection. There is no good reason why a person having a valid claim against a guardian and his sureties for a breach of the condition of the bond of the principal, for which principal and surety are alike expressly bound, should be required to make two bites at one cherry, or possibly a fruitless hunt, first after the principal, and then be turned round to pursue the surety, when the ends of justice can be better attained, and at less expense, by going at once after all, according to the condition of the bond. In *Franklin's adm'r v. Depriest*, 13 Gratt. 257, it is well said: "Creditors upon legal demands sometimes may, and upon equitable demands must, come in the first instance into equity to assert their claims, and may make the sureties parties, but they may omit them, and after establishing their claims against the executor and failing to get satisfaction by execution, may then sue upon the official bond, and their failure to unite the sureties in the chancery suit as defendants with the executor, will in no manner affect the question as to when the cause of action upon

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their official bond accrued." Certainly a decree is proper when against all properly chargeable with the plaintiff's claim.

As to the various exceptions to the commissioner's report, which are presented in detail under the appellant's second assignment of error, it is necessary to say but little after the very full statement of the case already given, including the reasons given by the commissioner for the result arrived at by him. It is sufficient to say that, except in the particulars in which the court below modified the report, the conclusions arrived at by the commissioner are fully borne out by the evidence in the cause; that the exceptions were all properly overruled, and the report, as modified by the court, properly confirmed. In fact, it would be a useless expenditure of time to examine in detail the various questions raised by the exceptions, inasmuch as it was practically conceded in argument by counsel for the appellant, that the only really contested questions are the allowances by commissioner Woodhouse to this ward for rent in excess of the allowances on that account in the *ex parte* settlement; the items of board and clothing as reduced by commissioner Woodhouse, and the charges in said *ex parte* settlement against the ward of \$100, December the 4th, 1869, and \$155.40, of March 1st, 1872, which last items the commissioner rejected because paid out of the proceeds of the sale of the North Carolina land, in the sale and conveyance of which Mrs. Barnes joined with her husband, Wm. A. Barnes, upon the express agreement that the estate of her first husband, Zebulon Berry, should to that extent be protected and preserved by the application of the proceeds of said North Carolina land to the said Grundy debt against the decedent's estate. The North Carolina land sold for \$700. All of this should have been applied to the payment of said Grundy debt; in fact it was received by Wm. A. Barnes upon express trust to be so applied, and for the benefit of the surviving Berry children, Isaac B. and Mary S. Had it been so applied, less than \$300 of the Grundy debt would have been left, by which, in equal portions, the interests of the two Berry

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children in the personalty of their deceased father would have been released. This estimate is upon the supposition that the \$100, December 4th, 1869, and \$155.40, of March 1st, 1872, charged to each of the wards on account of payments on said Grundy debt, were the true amounts so paid. But if the item of \$100 charged in the *ex parte* settlement was, as contended by Barnes, a mistake, and should have been one-third of the \$500 payment, claimed by Barnes to have been made on the Grundy debt, December 1st, 1869, or \$166.66, then this sum with the other item of \$155.40, charged to each of the wards, Isaac B. and Mary S., making together the sum of \$644.12 of the proceeds of the North Carolina lands thus accounted for; but leaving \$55.88 of said proceeds, of which no account is given. So that in neither event have these wards received the benefit of the entire proceeds of the North Carolina land, as intended by their mother in making sale thereof. For Wm. A. Barnes it is contended, that his wife having joined with him in the sale and conveyance of this land, and the bonds having been taken payable to him, the proceeds became absolutely his. He cannot, as between the parties here in interest, thus evade his trust. It is true, if Mrs. Barnes had thus unguardedly parted with her land, and the bonds for the purchase money, taken as they were, had passed in good faith into the hands of innocent *bona fide* third parties, the case would have been different; but there is no such claim of any such party, and the decree in disallowing the charges by this guardian against his ward, for payments on the Grundy debt, out of the proceeds of the North Carolina land, is eminently proper.

In respect of the other contested items (1), of charges in the *ex parte* settlement for board and clothing, which were reduced by Commissioner Woodhouse, and the credits allowed ward for rent of farm, which were increased by the same commissioner, and confirmed by the court, it is only necessary to say, the report of the commissioner and the decrees complained of in these cases, respectively, are fully sustained and warranted by

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the evidence in the causes, and we are of opinion, that so far there is no error in the decree in either case. This brings us to the consideration, very briefly, of the exceptional feature contended for by the appellants in the other case of

. BARNES ET AL. V. BERRY.

In this case, the balance found and decreed in favor of the ward, Isaac B. Berry, is \$495.86, with interest from 2d of March, 1876, and costs. The additional objection insisted on in this case, and not made in the other case is, that Commissioner Woodhouse allowed appellant, Wm. A. Barnes, credit for only \$12, for board and clothing of his ward, Isaac B. Berry, the appellee, for the year 1869, and only \$25 on same account for the year 1870, after which no allowance was made by commissioner for board and clothing of ward. There is nothing in this contention. The evidence clearly shows that the ward for these years made quite a useful hand on the farm, and was much of the time during cropping season kept from school to work for the appellant, and was useful as a hand in plowing and hoeing. Under the peculiar circumstances, the allowances by the commissioner, for these years, was ample. Afterwards this ward, for part of the time, lived with and received from a relative in Camden, North Carolina, his board and clothes; and when living with his step-father thereafter, for reasons stated above, and by reason of his increased usefulness on the farm, it was proper that no allowance for board and clothes should be made. There is no error in this respect, nor is there any error in the decrees complained of in either case, certainly none of which the appellants can complain. We are therefore of opinion to affirm the decrees appealed from in both cases, with costs to the appellees, respectively; and both causes are remanded to the circuit court of Princess Anne, to be further proceeded with in accordance with the views herein expressed.

DECREES AFFIRMED.

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Wytheville.

JONES v. THE COMMONWEALTH.

GRAY v. THE COMMONWEALTH.

JUNE 18TH, 1885.

1. CRIMINAL PROCEEDINGS—*Negro—Colored Person—Definition.*—The term “negro” is identical in signification with the term “colored person,” as defined by section 2, chapter 103, Code 1873; that is, “a person with one-fourth, or more, of negro blood.” *Patterson's case*, 28 Gratt. 940.
2. *IDEM.*—*Felonious marriage—Indictment—Onus probandi.*—In order to sustain an indictment under section 8, chapter 7, Acts 1877-'78, making the intermarriage of a negro with a white person, a felony, it is necessary first to establish that the accused is a person with one-fourth, or more, of negro blood, *id est*, a negro; and the burden of proving this, lies on the commonwealth.

Error to judgment of circuit court of Montgomery county, rendered 29th November, 1884, affirming a judgment of the county court of said county, rendered 3rd August, 1884, whereby the person, Isaac Jones, a negro, was sentenced to the penitentiary for two years and nine months, for felonious marriage with Martha Gray, a white woman.

Opinion states the case.

George G. Junkin, for the prisoners.

Appellant submits: That as he is not a full negro, but is a mulatto, he is not within the act of 1877-8, p. 302, section 8.

Argument.

A negro is one who is of the full African race, just as a white person is of the pure Caucasian race. (Webster's dictionary.) The distinction between negroes and mulattoes was fully recognized as a social fact before the Code of 1819. There was no doubt as to what was a negro. The legislature defined a mulatto by statute (1 R. C. p. 428, section 11), and included all persons who had one-fourth, or more, of *negro blood*.

Code of 1819 recognized negroes and mulattoes as different classes of persons. 1 R. C. pp. 401, 422, 423, 424, 425, 426; (negro or other slave), 431, 432, 434, 437, 438, 440; 2 R. C. p. 43.

Code of 1847-8, page 111, when this crime was first introduced, carefully uses *both* terms. 1 Code 1849, chap. 103, sec. 3, introduced a rule of construction: "The word negro in this and any future statute shall be construed to mean mulatto, as well as negro," and accordingly, Code 1849, page 740, sect. 2, struck the word mulatto from the section prohibiting such marriage by a white person, and so the matter remained as to the meaning of "negro" until Acts 1865-6, page 84, when apparently to conform the definition to the colored persons, the marriage enabling act passed same day and found on the next page; the present statute as to definition of term "colored persons" was placed upon the statute book and the *statutory definition of mulatto and of negro repealed*, and the rule of construction of word negro was repealed.

It is submitted that all colored persons are not negroes—that the only law that ever existed including mulatto under the term negro has been repealed, and if the legislature has not fully remedied the effect of the repeal, still that is for them and not for the courts to do.

- The repeal of a statute reinstates the common law rules. 16 Gratt. 1, 363, 519.

Then as the rule was introduced to prevent the necessity of the repetition of the word mulatto in order to make a statute against negroes apply to mulattoes, the repeal of that statute,

Argument.

reinstates the necessity to use the word mulatto if a penal law is to apply to them, as they are of a different kind, class and race of people, especially as penal laws must be strictly construed. 1 Tucker's Comm. 16; 3 Munf. 507.

The commonwealth proved that Jones was a mulatto, but did not prove the *quantum* of negro blood in him, and therefore did not prove him even a colored person. Code, ch. 103, sec. 2.

Attorney-General, F. S. Blair, for the commonwealth.

The indictment in this case was against Isaac Jones, a negro man, for intermarrying with one Martha Arthur, *alias* Gray, a white woman. He was found guilty.

The demurrer was properly overruled—

1. Because the indictment, like lewd and lascivious cohabitation, etc., could have been either joint or several. *Scott v. Commonwealth*, 77 Va., p. 344, and cases therein cited.

2. Because the statute, sect. 8, page 302, Acts 1877-8, under which indictment was found, *was not contrary* to constitution of the United States, as claimed.

Marriage is a matter exclusively of state police, and state laws may regulate the whole subject. *Tinsley v. Virginia*, decided by supreme court of U. S. in 1882.

The indictment was, as stated, for the intermarriage of a negro man with a white woman, the plea was "not guilty," and on this issue the trial was conducted.

The instruction of the court was directly pertinent to the issue, and fully expounded the law, and there was no necessity for instructions of prisoner.

It is believed the word "negro," however, would legally embrace all "colored persons," under sect. 2, ch. 103, Code 1873, as contradistinguished to white persons.

But it is *not necessary* for the court to decide *this question*, in *this case*, as the jury, upon the most abundant proof, found that

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Jones was a *negro* man, and had married Martha Arthur, *alias* Gray, a *white woman*.

The jury were judges of the credit of the witnesses, and they were satisfied that Jones was a *negro*, and his wife a *white woman*, and this is the whole case. An appellate court will not say, that, after taking the commonwealth's evidence (which alone can here be considered), the jury was not well warranted in their verdict.

LACY, J., delivered the opinion of the court.

The case is as follows:

In September, 1888, the plaintiffs in error were indicted in the county court of Montgomery county for intermarrying, the one being a *negro* and the other a *white person*.

The indictment against Isaac Jones is as follows: "That Isaac Jones, a *negro*, did, in the county aforesaid, on the day of February, 1883, feloniously intermarry with one Martha Arthur, *alias* Martha A. Gray, a *white person*, against the peace and dignity of the commonwealth."

Upon the trial, the plaintiffs in error were convicted and sentenced to the penitentiary for two years and nine months, and two years, respectively.

From this judgment and sentence of the county court, the plaintiffs in error applied to the circuit court of the said county for a writ of error, which was allowed; and upon the hearing in the said circuit court, the judgment of the county court was affirmed. From which judgment a writ of error was allowed to this court, upon the petition of the said plaintiffs in error.

In this court it is assigned as error that the county court refused to set aside the verdict of the jury upon the motion of the plaintiffs in error, as contrary to the law and the evidence. The facts are certified by the county court; wherefrom it appears, that it was proved that Isaac Jones was a *mulatto* of brown skin, but that there was no evidence to show the *quan-*

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tum of negro blood in his veins, and no evidence of his parentage, except that his mother was a yellow woman. That as to the *color* and *parentage* of Martha, the evidence was conflicting.

It appears from the certificate of the evidence in the bill of exceptions No. 1, excepting to instructions given in the case by the court, that there was evidence tending to prove that the woman had negro blood in her veins; that her mother had given birth to negro children before her birth; that she herself was a bastard, and was accustomed to associate and attend church with the negroes; and the colored pastor of the church testified that there were colored persons attending his church whiter than the said Martha.

Our statute provides, that "Any white person who shall intermarry with a negro, and any negro who shall intermarry with a white person, shall be confined in the penitentiary not less than two nor more than five years." Acts 1877-78, sec. 8, chap. 7, criminal code, approved March 14th, 1878, p. 302.

The indictment is drawn under the statute, and conforms thereto. The charge against Isaac Jones is, that he is a negro, and that being a negro he was married to a white woman. To be a negro is not a crime; to marry a white woman is not a crime; but to be a negro, and being a negro, to marry a white woman is a felony; therefore, it is essential to the crime that the accused shall be a negro—unless he is a negro he is guilty of no offence. It is necessary, then, to consider what is a negro under our law. Section 3 of chapter 103 of the Code of 1849, provided, that "Every person who has one-fourth part or more of negro blood shall be deemed a mulatto, and the word negro, in any other section of this or any future statute shall be construed to mean mulatto as well as negro."

Under that law, a negro was a person who had one-fourth or more negro blood in him; if the white blood predominated in any degree greater than three-fourths, the person was not a negro under the law and not a mulatto.

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This law remained in force until February 27th, 1866, when the legislature substituted that law with the following:

“Every person having one-fourth or more of negro blood shall be deemed a colored person.” Acts 1865-66, p. 84. And such is the present law in our Code. See ch. 103, sec. 2: “Every person having one-fourth or more of negro blood shall be deemed a colored person.”

In 1865, as we have seen, the term colored person was substituted for the word negro, which had before that included the terms negro and mulatto.

But the statute of March 14th, 1878, amending the 8th section of chapter 192 of the Code 1873, which is the 8th section of the 196th chapter of the Code of 1849, enacted in 1847-8, using the word negro as did the original act of 1847-8, (see Acts 1847-8, p. 111,) and prescribing the same penalty for the negro which it provides for the white person. It does not use the term “colored person,” but the word negro, and the plaintiff in error contends that this word can only mean a full-blooded African, and cannot include either the term mulatto or colored person, but must mean only a full-blooded African, since the statutory definition of negro, to which we have referred, has been repealed, and no definition of negro substituted, that the term negro by statute before 1865 included mulatto, but that statute being repealed, and there being no statutory definition of negro, it no longer by law includes mulatto. On the other hand, the attorney-general contends, that the term negro embraces all colored persons, as described and defined in section 2, of chapter 103 of the Code. If the contention of the plaintiff in error is correct, then the law has no application to any colored persons or mulattoes except the full-blooded African. Whereas, if the attorney-general is correct, the law applies to all persons who have as much as one-fourth negro blood in their veins, as provided in section 3, chapter 103, of the Code, *supra*.

At the March term of this court, 1877, this court construed

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the said 2nd section of chapter 103, in a case which arose under the said 8th section of chapter 192 of the Code of 1873. In that case Judge Moncure, in an opinion in which the other judges concurred, said, "It thus appears that less than one-fourth of her blood is negro blood. If it be but one drop less, she is not a negro; besides having certainly derived at least three-fourths of her blood from the white race, she derived a portion of the residue from her great grandmother, who was a brown skin woman, and of course not a full-blooded African or negro, whose skin is black and never brown. If any part of the said residue of her blood, however small, was derived from any other source than the African or negro race, then Rowena McPherson cannot be a negro." See *McPherson's case*, 28 Gratt. p. 940. The term negro being held to be identical in signification with "colored person," as defined in section 2, chapter 103, of the Code, *supra*. See also Min. Inst. vol. 1, p. 242. It would then seem that to sustain an indictment under this statute, it is necessary to establish first, that the accused is a person with one fourth or more of negro blood, that is, that he is a negro; unless this is proved, the offence is not proved, because this is a necessary and essential element of the crime, without which there is no crime committed, as we have seen. From the certificate of facts in this case we find, that the accused was not a full-blooded negro, but had white blood in his veins, but there was no evidence to show the quantity of negro blood in his veins, and no evidence of his parentage except that his mother was a yellow woman. If his mother was a yellow woman with more than half of her blood derived from the white race, and his father a white man, he is not a negro. If he is a man of mixed blood he is not a negro, unless he has one-fourth at least of negro blood in his veins, and this must be proved by the commonwealth as an essential part of the crime, without which it cannot exist. The commonwealth, as we have seen in this case, has produced no evidence of this fact, and if every accused person is to be presumed to be innocent

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until his guilt is proved, this person must be presumed not to be a negro until he is proved to be such. It follows that the judgment of the circuit court affirming the judgment of the county court, and the judgment of the county court complained of and appealed from here, must be reversed and annulled, and the case remanded to the said county court for a new trial to be had therein. And this applies with equal force to the case of Martha A. Gray, as to whom the same order will be entered.

HINTON, J., dissented.

JUDGMENT REVERSED.

Wytheville.

RUDD'S ADM'R v. R. & D. RAILROAD CO.

JUNE 18TH, 1885.

1. PRACTICE AT LAW—*Demurrer to evidence*.—It is well settled that by demur to the evidence, the demurrant admits the truth of all demurree's evidence, and all proper and reasonable inferences therefrom, and waives all his own evidence which is in conflict with, or tends to make a case different from the case of demurree's evidence. *R. & D. R. R. Co. v. Moore*, 78 Va. 93.
2. NEGLIGENT INJURIES—*Contributory negligence—Compensation*.—Compensation cannot be recovered for injuries done by defendant's mere negligence, where plaintiff by his own ordinary negligence contributed to cause the injury, so that but for such contribution the injury would not have happened, except when the direct cause of the injury is the defendant's omission (after becoming aware of plaintiff's negligence) to use proper care to prevent the consequences of such negligence. *R. & D. R. R. Co. v. Anderson*, 31 Gratt. 812.
3. IDEM—*Case at bar*.—Boy of twelve, sent by parents to mind cows in field along railway, lay asleep on the track, and was run over by freight train 375 yards long, and killed. Train was running down grade without steam. Boy was lying, when struck, 226 yards from a public crossing, which was 892 yards from a curve from which boy was visible. Boy had been repeatedly found sitting and lying down and asleep on the track, and warned. When engineer saw boy on track, he made, in vain, every effort to stop train, by reversing engine, etc. On demurrer to evidence, court below decided for defendant company. On appeal :

HELD:

Plaintiff's evidence is insufficient to warrant the verdict.

Argued at Richmond, and decided at Wytheville.

Statement—Opinion.

Error to judgment of circuit court of Nottoway county, rendered 6th April, 1883, in an action wherein Joseph E. Leath, administrator of Charles E. Rudd, deceased, was plaintiff, and the Richmond and Danville Railroad Company was defendant. The object of the action was to recover damages for the alleged negligent killing of Rudd, an infant aged twelve, by the defendant. At the trial the jury found for the plaintiff \$4750 damages, subject to the defendant's demurrer to the evidence. On that demurrer the judgment was for the defendant, and the plaintiff obtained a writ of error from one of the judges of this court.

Opinion states the case.

Edgar Allan, P. W. McKinney and F. S. Blair, for the plaintiff in error.

H. H. Marshall, for the defendant in error.

FAUNTLEROY, J., delivered the opinion of the court.

This suit is an action of trespass on the case against the said railroad company for the negligent killing of the deceased Charles E. Rudd, laying the damages at \$10,000.

Upon the trial in the court below, after the jury had heard all the testimony for the plaintiff and defendant, the said defendant demurred to the testimony as being insufficient in law to maintain the issue joined, of not guilty; the plaintiff joined in the said demurrer: whereupon the issue was submitted to the jury to say, what damage the plaintiff had sustained by reason of the matters shown in evidence, in case the judgment of the court should be given for the plaintiff; and the jury, after considering the same, returned into court and rendered their verdict, to-wit: "We, the jury, assess the damages of the plaintiff at forty-seven hundred and fifty dollars, (\$4750) subject to

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the opinion of the court upon the demurrer of the defendant to the evidence in this case."

And, thereupon, the court passed judgment sustaining the demurrer of the defendant to the evidence in the case, and dismissed the plaintiff's suit with costs, etc. To which judgment the plaintiff excepted.

The case comes up on a demurrer to evidence, and the single error assigned, is that the circuit court erred in sustaining the defendant's demurrer to the plaintiff's testimony, because said testimony was sufficient in law to render the said defendant company liable for the damages awarded by the jury, by reason of its gross negligence, which was the proximate cause of the death of the deceased.

On the 28th day of May, 1882, the deceased, Charles E. Rudd, a boy 12 years of age, who had been sent by his parents to mind cows in a field running alongside of the track of defendant's railroad, in Nottoway county, Virginia, was run over and killed by a train of loaded and unloaded freight cars, consisting of a locomotive and tender, and thirty-six cars, making a train about 375 yards in length, belonging to and operated upon the said defendant's railroad, in Nottoway county, Virginia, about two miles from Burkeville, in said county, the said Rudd being at the time lying across the said track, apparently asleep. The said train being on a heavy down-grade, had, at the time of the killing, been running without steam, and of its own momentum, for a distance of one and a-half miles, and would have continued so to run for two miles further. The said train turned around a curve in the line of the road, 1118 yards from where the boy was struck, and passed a public crossing 226 yards further on, or 892 yards before reaching the body of the boy. The boy had been repeatedly found on the track, sitting and lying down and asleep, at various times previous to the killing, and had been warned and expostulated with by various persons as to the danger of falling asleep and being run over and killed

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by the trains. He himself had narrated an escape that he had made from being killed by a passing train when he was lying down by the side of the track asleep, only about a week before he was killed.

It appears, from the plaintiff's evidence, that an experiment made with a boy about 12 years of age, and of the size of the deceased, showed that an object of that size could be seen on the road at the distance of 1118 yards from the curve or turn in the road.

These facts present the case of contributory negligence by the plaintiff; and negligence both contributory and concurring at the time and in the causation of the killing.

The judgment under review having been rendered upon a demurrer to evidence, the familiar and settled rule applies: that the demurrant admits the truth of all the demurree's evidence, and all proper and reasonable inferences therefrom, and waives all his own evidence which is in conflict with or tends to establish a case different from that of the demurree's evidence.

The plaintiff has made his own case; and the gravamen against the defendant is, a charge of gross negligence. The law will not impute it: the plaintiff must prove it.

The defendant company was in the exercise of its lawful rights and the discharge of its public duties, and was upon its own exclusive premises; while the plaintiff's intestate was unlawfully and negligently upon the track of the defendant—not at a station, or a public crossing; but at a portion of the track where defendant had a right not to expect or apprehend any person to be—certainly not lying down and asleep.

A railroad company does not bear the same legal relation to a stranger, trespassing upon its road-bed and highway, at unaccustomed and unappointed portions of its route, as it does to a passenger; and, though it may not kill or injure, with impunity, even a trespasser unlawfully upon its track, at any point or in any way, if by ordinary care it may avoid so doing; yet, in the language of this court, in the case of *Dunn v. Seaboard*

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and *Roanoke Railroad Co.*, 78 Va., Judge Lacy delivering the opinion of the court, "the extent of a person's duties is to be determined by a consideration of the circumstances in which he is placed. The law imposes duties upon men according to the circumstances in which they are called to act."

It is undeniably true, as alleged by counsel for the appellant, that a wrong-doer or trespasser upon the road and the rights of the defendant, is not an *outlaw*, to be run over, injured or killed with impunity, without the exercise of ordinary care and caution by the railroad company or its employees; yet, it is equally true, that railroad companies, in the exercise of their legal rights and duties, upon their own ground and highways, are under the protection of the law, against speculative suits, and excessive verdicts for damages, for injuries *caused by the equally proximate and concurring negligence* of trespassers and wrong-doers. It is admitted in the declaration in this case, that the plaintiff's intestate was asleep upon the track of defendant's road; and the evidence shows, that he had been repeatedly, and by sundry persons, warned of the extreme danger of putting himself in such a situation; and the declaration does not charge, that the defendant either knew of this contributory and co-operating negligence and fault of the plaintiff's intestate, or that the said defendant intentionally inflicted the injury, or did not use all possible care and caution to avoid it, *after it saw the situation and became aware of the danger*. The general charge is, *negligence* in using and operating the said road.

The *plaintiff's* own testimony, out of the mouth of his own witness, Elam Blankenship, who was the engineer running the train (and who had been for seventeen years an engineer) shows distinctly and emphatically that the defendant company used every means in its power to give warning to this boy, who was unlawfully and improperly asleep on its track, of the approaching train; and that it used every effort and appliance in its power to stop the train and prevent it from striking the boy. He says: "I was on schedule time when I struck the boy.

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When I first saw the boy, I blew the whistle quickly, as I would for cattle, and reversed the engine; and I blew the whistle for brakes ten or twelve times during the time my engine remained reversed till the train stopped. I reversed the engine as soon as I saw the object on the track. I always reverse the engine when I see something on the track. I had on that day thirty-six cars behind the engine. It would take me to stop the train moving at the rate it was going, and on that grade, and the train being composed of the number of cars I had, just as long as it took me to stop that day. I stopped just as soon as I could—in about the length of the train after passing the boy. It is very dangerous to my own life to run over any object on the track. I am very careful to avoid doing so. I was very careful to avoid running over this boy. I used every means in my power to stop the train as soon as I saw the object on the track. I was looking out that day all the way from the curve down.” This is the plaintiff’s own positive testimony; and it is only contradicted or disparaged by the mere *negative* testimony of *other witnesses of the plaintiff*, who did not hear the whistle blow until after the boy was struck; and yet, there were none nearer than one-half a mile off, and others three-fourths of a mile, from the place where the boy was struck; and none of them saw the boy, the place or the train, or knew where the accident occurred; or could see it, because of distance, intervening woods and inequalities of the surface of the ground. When they heard the whistle blow, they could not see—they did not see—and they did not even know that the boy had been injured at all; and, consequently, *not the place where he was injured*. This mere negative testimony of the plaintiff cannot impeach and overcome the other clear, positive and express testimony of the plaintiff.

The case of the *Richmond and Danville Railroad Company v. Anderson’s adm’r*, 31 Gratt. 812, was a case very similar to the case at bar. In that case, a *man* was lying upon the track and was run over and killed by the train. Judge Burks, delivering

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the opinion, said, "After the engineer saw the man on the track he used all the means in his power, hazarding even the safety of the passengers, in suddenly reversing the engine to avoid injuring him. He used all the care, skill and diligence which the situation demanded, but it was then clearly not in his power to prevent the accident. But it was argued, with much earnestness, that although it might be that the engineer did not see the deceased on the track until it was too late to avoid the collision, he might and ought to have seen him when it would have been in his power to stop the train and prevent the mischief; and that, but for his negligence in not keeping a lookout, he could and would have seen him in ample time to have checked the speed of the train, and, if need be, to have stopped it entirely. It was the duty of the engineer to have watched ahead for objects on the track; * * and if, from a negligent failure to observe and perform it, an accident had occurred by which a *passenger sustained injury*, the company would have been liable for the damage to such passenger. Whether a railroad company owes this duty, under all circumstances, to persons wrongfully on its road, need not be decided in this case. The engineer testified that he was at his post, but that he did not and could not see the deceased on the track in time to prevent the collision, because his vision was affected by the rays of the sun, which, at that hour of the day, shone directly in his face. Although the sun may not have shone in the engineer's face at one or more points, yet these would have been passed in an almost inconceivably short time, the train moving with a speed of twenty or twenty-five miles per hour, and thus the deceased, in the position he occupied, may have escaped the observation of the engineer, although on the lookout for objects on the track, and therefore without fault on his part. But for the negligence, or want of ordinary care and caution of the plaintiff's intestate, the misfortune, the loss of his life, could not have happened. He was in fault in going upon the track of the railroad. The defendant was the owner in fee simple of the road, and entitled

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to the full, free, *exclusive and uninterrupted use of it.* * * It is sufficient to say, that the engineer did not see the deceased on the track until it was too late, &c. If there had been no demurrer to the evidence in this case, and the jury had rendered a verdict for the plaintiff, it would have been the duty of the judge presiding at the trial to set aside the verdict, on the ground that the evidence was plainly insufficient to warrant it."

The experiment, made by plaintiff's witness, of placing a boy 12 years of age, and of about the size of the deceased, in position on the track, and then being able to see him from a point of observation 1118 yards off, when they knew that he was thus placed there, and their undertaking was *to see him*, does not prove that the deceased, lying down flat on the track, may not have escaped the observation of the engineer, even when he was at his post and on the lookout, at that great distance, and while the train was running rapidly along.

In the case of *Dunn v. Seaboard and Roanoke Railroad Co.*, *supra*, *Judge Lacy*, after reviewing all the authorities, English and American, upon the doctrine of contributory negligence, says: "It is better, we think, to adhere to the rule, already established in this court, * * * that one who is injured by the mere negligence of another, cannot recover any compensation for his injury, if he, by his own ordinary negligence or wilful wrong, contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him; except where the direct cause of the injury is the omission of the other party, *after becoming aware of the injured party's negligence*, to use a proper degree of care to avoid the consequences of such negligence." *Tuff v. Warman*, 5 Q. B. (N. S.) 573; *Richmond and Danville R. R. Co. v. Anderson's adm'r*, 31 Gratt. 812.

In *Anderson's case*, 31 Gratt. *supra*, the jury fixed the damages at \$6,000; and in *Clarke's case*, 78 Va. (3 Hansbrough), 709, the jury fixed the damages at \$7,500; yet, in both of these cases, this court sustained the demurrer to the evidence.

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In the case under review, we think, the evidence demurred to is plainly insufficient to warrant the verdict; and that, upon the plaintiff's own evidence, there is no liability, in law, upon the defendant for the killing of the deceased, under all the circumstances in the case; and the circuit court did not err in sustaining the demurrer to the evidence and rendering judgment for the defendant; and the same must be affirmed.

LEWIS, P., and RICHARDSON, J., dissented.

JUDGMENT AFFIRMED.

Wytheville.

HALL v. THE COMMONWEALTH.

JUNE 18TH, 1885.

1. CRIMINAL PROCEEDINGS—*Jurors—Impaneling.*—The statutory provisions under sections 3 and 4, chapter 17 of Acts of Assembly 1877-78, are imperative and essential. The accused is entitled to demand strict compliance with them. Omission of such compliance is error.
2. IDEM—*Jurors—Mode of selection—Venire facias.*—In a case where death may be the punishment, the writ shall require to be summoned twenty-four persons of the county or corporation, to be taken from a list to be furnished by the judge, residing remote from the place where the offence is charged to have been committed, and qualified in other respects to serve as jurors. From these shall be selected a panel of sixteen, free from exception, and from this panel the accused may strike four, and the remaining twelve shall constitute the jury. Acts 1877-78, page 340, section 4.
3. IDEM—*Second venire facias.*—In any felony case, where from those summoned and in attendance, a sufficient number of jurors cannot be had, a new *venire facias* must be directed, requiring to be summoned from the bystanders, or from a list to be furnished by the court, as many persons as may be deemed necessary. Id. section 4.
4. IDEM—*Omission of essentials—Error—Waiver—Motion in arrest of judgment.*—Omission to direct new *venire facias* or omission of any statutory essential apparent on the record, is error, and may be taken advantage of after verdict by motion in arrest of judgment, failure of accused to make the objection before jury sworn being no waiver.

Error to judgment of circuit court of Montgomery county, rendered 30th May, 1884, on an indictment against S. D. Hall, for the murder of Charles A. Bowyer, on 25th September,

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1872; by which judgment, the jury by their verdict having found said Hall guilty of murder in the first degree, as charged in the indictment, the said court sentenced the said Hall to be hanged by the neck until dead.

Said Hall was indicted in the county court, but upon his arraignment, he elected to be tried in the circuit court of said county, and was there tried with the result aforesaid.

It appears from the record that "twenty-four jurors having been summoned in the manner prescribed by law, the prisoner by his counsel asked that the selection of the panel of sixteen from the number summoned be by lot; but the court directed that a panel of twenty-four, free from exceptions, should first be obtained, and that from such panel sixteen should be chosen by lot. Thereupon it was ascertained that seventeen of the twenty-four summoned under the *venire facias* were free from exception. By direction of the court, the sheriff then summoned additional jurors from the bystanders, until seven other persons were found free from exception; and thereupon, from the twenty-four persons so found sixteen were selected by lot. From the list thus selected, the prisoner struck off the names of four persons, and the remaining twelve were sworn as the jury in the case." After the verdict was rendered, the prisoner moved for a new trial, on the ground that "the venire and the jury which tried him was neither selected, summoned nor impaneled in the manner required by law," which motion the court overruled. And thereupon, on the same ground, he moved in arrest of judgment, which motion was also overruled by the court, and sentence pronounced as aforesaid. To this judgment a writ of error was awarded by one of the judges of this court.

James A. Walker and *A. A. Phlegar*, for the prisoner.

I. The jury was not called, chosen, sworn and impaneled according to law, and the record shows this. Code 1873, chap.

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158, § 24, p. 1063; Acts 77-8, chap. 17, § 1, p. 339, §§ 3, 4, 8, 11; *Sands' case*, 21 Gratt. 871, 881.

II. A prisoner who is not tried according to all the formalities of law, is not tried by "*due process of law*." *Boggs v. The State*, 6 Am. Reports, 689-90; *Hopt v. Utah*, 110 U. S. 578-9; 19 Gratt. 656.

III. All steps *necessary* to be taken in a criminal case must appear affirmatively on the record. *Gregg v. The People*, 1 Am. Crim. Report, 602; *Aylesworth v. The People*, 1 Id. 604; *Davis v. The State*, 1 Id. 606; *Stubbs v. The State*, 1 Id. 611; *Hopt v. Utah*, 110 U. S. 579.

IV. The errors appearing on the face of the record will be corrected on a writ of error, and no bill of exceptions was necessary. No bill of exceptions lies in any criminal case at common law, or in Virginia, except by statute. *Freeman v. The People*, 47 Am. Decisions, 220; *Mitchell v. The State*, 25 Id. 442; *Ewell v. The State*, 27 Id. 485; Acts 77-8, p. 345, ch. 18, § 1.

V. A writ of *venire facias* is necessary to authorize a sheriff to summon a jury in a criminal case. An omission to issue the writ is a fatal error, apparent on the face of the record. *The People v. McCay*, 18 Johnson, 215-16-17.

A court cannot discharge a juror of its own motion. 6 Am. Rep. 689; 2 Id. 423.

The venire of twenty-four men, summoned from the list furnished by the judge of the county court, composed the panel from which the jury was to be selected, and the court had no right to add to, alter or change that panel, except for cause.

The record shows on its face the following errors:

1st. It was error to place the seventeenth man of the twenty-four on the panel. Sixteen of the original twenty-four having been found free from exceptions, the prisoner had the right to strike four from that number and be tried by the remaining twelve.

2nd. It was error to summon seven additional jurors from

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the bystanders after the original panel had furnished seventeen qualified jurors free from exception.

3rd. It was error to direct the sheriff to summon additional jurors from the bystanders without a writ of *venire facias* and without a list furnished by the court.

4th. It was error to select sixteen of the completed panel of twenty-four by lot, there being no law authorizing such a proceeding. By this proceeding the court, without the consent of the accused, caused three of the original sixteen jurors, viz: Warren A. Puckett, Lafayette McCauley and Christian Olinger, to stand aside, and substituted three others without the consent of the prisoner, viz: C. E. Lowder, Oscar M. Nelson and James Walters. *State v. Brown*, 2 Am. Crim. Rep. 423.

Attorney-General, F. S. Blair, for the commonwealth.

The prisoner does not say he was not fairly dealt with, or that he suffered any injury from the mere manner in which the jury was formed. The objection, if good, was made too late. No exception was taken at the opening of the case, but it was reserved for the motion to set aside the verdict.

The objection, if good, ought to have been made before the jury was sworn. *Bristoe's Case*, 15 Gratt.; *United States v. Gale*, U. S. Reports, 109, p. 65. The statute provides, that where the penalty may be death, the writ shall require the officer to summons twenty-four persons, in manner as provided in 33d section. Ch. 17, sec. 4, Acts 1877-78, read in connection with sections 3 and 4, sec. 8 of same chapter, which provides that where the penalty may be death, there shall be selected from the persons summoned—(not from the original *venire facias*)—from those summoned, either by the new *venire facias* or from the bystanders, so as to get the twenty-four as required by sec. 4. The plain and manifest purpose of the statute is to have twenty-four persons free from exception where the penalty may be death, and sixteen where it may not. Suppose from those originally sum-

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moned only ten be found free from exception, what must the court do? Must it summon six others and stop, or must it not summon, as provided, until twenty-four be gotten free from exception, and from the twenty-four select the sixteen? Why does the law require twenty-four to be summoned, if that number are not to be found free from exception, so as to select the sixteen from them? *Epe's Case*, 5 Gratt. p. 696, where this language is used: "In making up the panel of twenty-four," etc. Thus you will see the panel is incomplete until twenty-four are gotten, which fact is shown more plainly by the reasoning of the court in *Dowdy v. Commonwealth*, 9 Gratt.; see particularly pp. 735 and 736. The plaintiff in error will contend that from the number so summoned a sufficient number to try the case was all that was to be required. Twelve is a sufficient number to actually try. If the law did not intend to distinguish between cases where punishment might be death, why in one case is sixteen required, and twenty-four in the other, and in both is the peremptory right to strike off four? The court in this case only selected from those summoned a panel of sixteen. As said before, the eighth section does not say, shall be selected from those summoned by the original *venire facias*, but says, "there shall be selected from the persons summoned a panel of sixteen persons, free," etc.

Who are the persons summoned? Sec. 4.—When punishment may be death, twenty-four, if a sufficient number for the trial cannot be had, etc., etc., the court may direct another *venire facias*, and cause to be summoned from bystanders, etc. So the eighth section refers as much to the second *venire facias*, and to those from the bystanders, as the first *venire facias*. Suppose the original twenty-four had all been found free from exception, would the court have been compelled to stop when it secured sixteen, or would it not have been fairer to the prisoner to have taken the entire twenty-four, selected by lot sixteen, and then strike off the four? See *Sands v. Commonwealth*, 21 Gratt. p. 871, and especially pages 880–1. Then the law re-

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quired, where the punishment might be death, more than twenty-four, and the *venire facias* only summoned twenty-four. On the latter part of page 881 the court says, that "though there was error, (and the objection was made before the jury was sworn) * * * * * it would have been cured by the subsequent proceedings." The selection and impaneling a jury is merely *directory*. See *Wash v. Commonwealth*, 16 Gratt. page 580; and unless they can show that injustice resulted from the irregularity, it is no ground for reversal.

It will be seen from page 8 of record, that if the court erred at all, it was in mercy and in favor of prisoner, because it required that a *venire* of *twenty-four men, free from exception*, should be first obtained, while prisoner merely wanted a panel of twenty-four men, regardless of such consideration, from whom *sixteen* free from exception could be chosen by lot.

LEWIS, P., delivered the opinion of the court.

The statute relating to the summoning and selecting of jurors in cases of felony, as it stood in the Code of 1860, chapter 208, has been amended, and the law, as it now is, provides as follows: "3. The writ of *venire facias*, in a case of felony, other than where the punishment may be death, shall command the officer to whom it is directed to summon sixteen persons of his county or corporation to be taken from a list to be furnished him by the judge of his county or corporation, residing remote from the place where the offence is charged to have been committed, and qualified in other respects to serve as jurors, to attend the court wherein the accused is to be tried, on the first day of the next term thereof, or at such other time as the court or judge may direct. * * * 4. In a case where the punishment may be death, the writ of *venire facias* shall require the officer to summon twenty-four persons, in the manner provided in section three of this chapter; and in any case of felony, where a sufficient number of jurors for the trial of the case can-

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not be had from those summoned and in attendance, the court may direct another *venire facias*, and cause to be summoned from the bystanders, or from a list to be furnished by the court, so many persons as may be deemed necessary to complete the jury. * * * 8. In all cases of felony, where the punishment cannot be death, the jury shall consist of twelve, summoned as aforesaid, and free from exception. From the panel summoned, the accused shall have the peremptory right to strike off four persons. In all cases where the punishment may be death, there shall be selected from the persons summoned a panel of sixteen persons, free from exception, and from this panel the accused may strike four, and the remaining twelve shall constitute the jury; or if the accused does not strike them off, twelve of the panel shall be selected by lot, who shall constitute the jury." Acts 1877-78, p. 340, *et seq.*

These provisions of the statute, in respect to empaneling juries, are not directory merely, but imperative. They are rules which are made essential in proceedings involving life or liberty, and it is the right of the accused to demand that they be strictly complied with. To disregard them is to deprive the accused of that "due process of law" which is provided by the legislature, and which is required by the fundamental law of the land.

In the present case the record shows they have not been complied with, and the judgment of the circuit court is therefore erroneous. Of the twenty-four persons originally summoned, sixteen having been found free from exception, the jury for the trial of the accused ought to have been selected from the panel of sixteen who were thus found to be qualified. And the selection should have been made by the accused striking four from the panel, leaving the remaining twelve to constitute the jury; or, if the accused chose not to do so, then twelve of the sixteen should have been chosen by lot. This the statute requires, and if one of the formalities which it prescribes may be disregarded, all may be set at naught. Moreover, it was error to cause bystanders to be summoned without directing another

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venire. At common law a *venire* is indispensable to authorize the sheriff to summon a jury; and the statute, as we have seen, provides, that where a sufficient number of qualified jurors cannot be had from the twenty-four persons originally summoned and in attendance, the court may direct another *venire* to summon as many persons as may be deemed necessary to complete the jury, either from the bystanders or from a list to be furnished by the court. But in any event a *venire* is indispensable; and in a felony case, and especially in one affecting the life of the accused, the court is not authorized to dispense with a process required by the common law and also by the statute. And the omission to direct a *venire*, when required, is an error apparent on the record, of which advantage may be taken on motion in arrest of judgment. Whart. Crim. Pl. & Pr. (8th ed.), sec. 759; *The People v. M'Kay*, 18 Johns. 212. The accused cannot, therefore, be considered as having waived the right to raise the objections now urged, because of his failure to do so before the jury were sworn. On the contrary, he must be considered as standing on his legal rights throughout, and as waiving nothing. For it is not he alone who is concerned. The public has an interest in his life and liberty, and neither can be taken except in the mode prescribed by law. We are of opinion that the judgment ought to have been arrested, and must therefore be reversed.

JUDGMENT REVERSED.

Wytheville.

SMITH v. PERRY, ADM'R, AND ALS.

JUNE 18TH, 1885.

1. **MARRIAGE OF COLORED PERSONS—*Legitimacy of children.***—Under act approved 27 February, 1866, to legalize marriage of colored persons living together as husband and wife at the time of its passage, children of such persons are deemed legitimate whether born before or after the passage of said act, and whether any sort of marriage ceremony had taken place between the parents or not.
2. **IDEM — *Bastardy.***—In such cases, the question of bastardy must be considered as in any case where bastardy is alleged as to a child born during coverture, or born before and recognized afterwards.
3. **LEGITIMACY—*Presumption.***—This law presumes legitimacy where husband recognizes the child as his, and impossibility of procreation is not established, though the cohabitation had ceased before the passage of this act.
4. **BASTARDS IN VIRGINIA.**—They are persons born out of wedlock, lawful or unlawful, or not within competent time after termination of coverture, or if born out of wedlock, whose parents do not afterwards intermarry and the father acknowledges them, or who are born in wedlock when procreation by the husband is impossible.

Appeal from decree of circuit court of Wythe county, rendered 7th December, 1881, in a chancery suit wherein Allen Smith is complainant, and Charles Perry, administrator of Edmond Smith, deceased, and Westley Johnson and Richard Clark are defendants.

The object of the suit is to settle the estate and distribute the same, the complainant claiming to be the father and sole heir and distributee of the intestate. The defendants, Johnson and

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Clark, contended that the intestate was a bastard, and that they were his next of kin on his maternal side, and consequently his lawful heirs, and filed answers setting up their contention. Depositions were taken on both sides, whereby it was established that Allen Smith, the complainant, and Mary Bell were colored persons living together as husband and wife when the act of 27th February, 1866, was passed; that the intestate, Edmond Smith, was a child of the woman, born before that time, and living with them as their child, recognized as such by both, bearing the man's name, educated as his child and calling him father; and that after his mother had died, and he had gone out, earned money and purchased real and personal property, he had been taken sick and carried to Allen Smith's house, and there died. After his death, he was alleged by the defendants, Johnson and Clark, and by many others of respectability, to have been the son of one Randall Austin, and a bastard.

The court below decided that Allen Smith was not the father of the intestate, and that said Johnson and Clark were his heirs at law and distributees, and as such entitled to his estate. From this decree Allen Smith appealed.

Robert Crocket, for the appellant.

Holbrook & Thomas, for the appellees.

The Act of Assembly, February 27th, 1866, Code of Virginia, 1873, chapter 103, section 4, was intended simply to legalize *de facto* marriages had between colored persons, and in no wise to alter or affect the Bastardy Act, Code 1873, chapter 119, sections 5 and 6.

So that the Statutes of Descents, in Virginia, applies alike to white and colored persons in respect to issue born out of wedlock, and the same proof of paternity and of recognition by the father before or after the marriage is necessary to legitimize such issue. 1 Minor's Institutes, 421.

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Three things are essential under our Bastardy Act to legitimize the child.

1. The paternity of the father.
2. Recognition by him, either before or after marriage.
3. The marriage of the parents.

These must all concur, and must be established by conclusive proof. Code 1873, chapter 119, section 6; *Ash v. Way's Administrators et als*, 2 Gratt. 204; Judge Brooke, in *Coutts v. Greenhow*, 2 Munf. 373. See also 5 Call, 439, and 3 H. and M. 225.

The proof in this cause does not establish paternity of appellant, no recognition, but the reverse. This is shown

a. By the fact that appellant brought suit in the first place against Edmond Smith's estate as a creditor, which is incompatible with his claim in this suit.

b. By the preponderance of the evidence taken altogether in favor of the appellees.

c. By the number and character of the witnesses for appellees, and their better opportunities for learning the facts. *Sixteen* witnesses were examined for them. Of these, Dr. James Kincannon, Mrs. Susanah Kincannon, and Judge J. H. Fulton, and Sela Nave, Shepherd Austin, Gloud Adkins and Randall Austin (the last four colored) were members of the Kincannon family, to which Edmond Smith's mother belonged, and all of whom testify that Randall Austin, and not Allen Smith, was the reputed father of the said Edmond.

d. By the admission of Allen Smith himself that he was not Edmond's father.

e. By the statement of Edmond's mother.

f. By the positive testimony of Randall Austin, that he himself, and not Allen Smith, was the father of the said Edmond.

g. Of *ten* witnesses examined for appellant, not one of them was a member of the Kincannon family.

The judge of the circuit court knowing many of the wit-

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nesses personally was able to judge of their credibility, and his decision is therefore entitled to the greater consideration.

LACY, J., delivered the opinion of the court.

The appellant instituted his suit in the circuit court of Wythe county, against the appellee as the administrator of one Edmond Smith, dec'd, for an account and distribution of the said estate, claiming to be entitled to the same as the father and heir at law of the said Edmond Smith, dec'd, and against the appellees, Johnson and Clark. That the said appellant was a colored person and a slave before the passage of the act of assembly of Feb'y 27th, 1866, "to legalize the marriages of colored persons then cohabiting as husband and wife;" that at the time of the passage of the said act, he being such colored person, he had undertaken and agreed to occupy the relation of husband to a colored woman named Mary Bell, who like himself was a colored person, and that she had in like manner undertaken and agreed to occupy the relation to him of wife: and that thus he and his wife, both being colored persons and slaves, had undertaken and agreed before the passage of the said act to occupy the relation to each other of husband and wife, and that they were cohabiting together as such at the time of the passage of the said act. That there had been born to them before the passage of the said act, a son, who was named Edmond Smith, who was the same Edmond Smith mentioned above, now deceased, and upon whose estate the said appellee Perry had qualified as administrator. That he had so lived with his said wife until her death, which occurred many years afterwards, and that their son, who had survived his mother, was always recognized as their child, reared as such in their house. That the said Edmond, growing to manhood, worked for himself and acquired property, and falling sick, was removed to the house of his said father, where he was cared for until his death as his son.

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To this bill the administrator, the appellee Perry, answered, disclaiming knowledge upon the subject of the bill as to the claim of said appellant, and calling for proof. The appellees, Johnson and Clark answered, claiming to be the next of kin on the maternal side of the said Edmond Smith, dec'd, claiming that said Edmond was a bastard, and not the child of his said reputed father, and husband of his mother, but of another person, and that his property passed and descended to his maternal kindred only.

The depositions of numerous witnesses were taken, and upon the hearing the circuit court decided that Allen Smith was not the father of Edmond Smith; that the said Edmond Smith was a bastard, and that his estate passed to his maternal kindred alone, and that the appellees, Johnson and Clarke, were his heirs at law and distributees, and as such were entitled to his estate, and dismissed the bill of the plaintiff.

From this decree an appeal was allowed to this court.

Under the act of February, 1866, the children of the colored persons coming within its provisions are deemed by the law legitimate, whether born before or after the passage of the act in question. The act is made to apply to such persons as are included within its terms, from reasons of public policy too obvious to need review at this day, the status of the slave having been changed to that of citizen by the law, recognizing the logic of events, the marriage relation as existing among those people was respected and brought within the sanction of the law; and the act legalizing the informal marriage, making the issue of such legal marriage legitimate, in its beneficence, reached back into the past and legitimized their children, born before the passage of the act, and thus before the marriage was legal.

But it is contended by the appellees, that the object of the law was to legitimize only such children born before the act was passed, as had been born after the parents had taken upon themselves the form of marriage, sometimes formally had between slaves; and that the law did not intend to legitimize

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children born to their parents before some sort or any sort of formal public ceremony was undergone between the parties; and that in this case Edmond Smith was born before a formal ceremony of marriage was had between his mother and her husband.

It is a *concessum* in the cause that Edmond Smith was born before there had been any sort of ceremony performed between his mother and Allen Smith; and that such ceremony, formal in its character, and public in its enactment, though not recognized by the law, was had between the parties before the passage of the act in question.

But the proposition that the law had any reference to this sort of marriage, or that the fact of birth before or after such ceremony is in anywise within the contemplation of the law, is denied and controverted by the appellant.

It is decisive of this question that the law does not in any way refer to such ceremony, but provides for cases where "colored persons have undertaken and agreed to occupy the relation to each other of husband and wife, and shall be cohabiting together as such at the time of the passage of the act."

The plain terms of the law include all such persons, without any reference to what sort of an undertaking or agreement has been entered into, and extends its beneficence to all their children whether born before the passage of the act or afterwards; obviously the object of the law was to legalize the cohabitation referred to, and to legitimize the issue of such cohabitation. This remedy provided by the law for illegal marriages, and for the bastardy consequent thereto, must be liberally construed to advance the remedy, and extend the relief contemplated by the law. And it would be illiberal to construe this law to require some formal ceremony when none whatever is required by the law, and to apply the law to a part of the children and exclude some, when none are excluded, but all included by the law. To so construe the law would limit its application to only a small part of the persons who seem to be

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included by its terms, and to convert the law into a hollow mockery so far as the great body of the colored people are concerned.

If there had never been any formal or public marriage ceremony between the parties, if they had agreed to occupy the relation of husband and wife to each other, and were cohabiting as such at the time of the passage of the act, the marriage is consummated by the passage of the act, and the issue of the union, whether then born or born afterwards, is legitimized. And it is entirely immaterial, whether there had been any formal ceremony or not, either as to the legitimacy of the children, or as to the legality of the marriage. The act consummated both, when the parties came within its terms. But it is contended farther by the appellees, that the appellant was not in fact the father of Edmond Smith, but that he was begotten by a negro named Randall Austin, and although his mother was legally married, he did not come within the terms of the law which legitimized their children, he being in fact the child of only one of them, and that one the mother.

It must be conceded that in such a case the question of bastardy must be considered as that question would be, in any case where bastardy was charged against a person born *during coverture*, or recognized during coverture, though born before. The law having legitimized all their children, no matter when born; and although the coverture may have ceased, the children are made legitimate if they are recognized by the father as his.

The presumption of the law is in favor of the legitimacy of the child where recognized by the husband, unless procreation by the husband was impossible for any cause, from his being beyond seas, and the like.

This law legalizes the undertaking and agreement, if cohabitation has continued unto the day the law was passed, and legitimates all their children, and if cohabitation had ceased from

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any cause, it legitimatizes the children, if recognized by the father. It thus, in effect, antedates the marriage, and makes it valid from the time the relation began, and their children are legitimate whether recognized or not, if the cohabitation continued unto the day of the passage of the law, and it was not in the power of the father to bastardize the children begotten by him, if he was still cohabiting with the mother. Where the connection and cohabitation has ceased before the passage of the law, the legitimacy of the child depends upon the recognition of the father.

We have seen then that Edmond Smith was a legitimate child. Unless he is proved by positive testimony to be a bastard, the law *presumes* that he was not a bastard. What is a bastard in Virginia? It must be borne in mind that a bastard in Virginia is not defined as at the common law. He is one born out of wedlock, lawful or unlawful, or not within a competent time after the coverture is determined; or, if born out of wedlock, whose parents do not afterwards intermarry, and the father acknowledge the child; or who is born in wedlock when procreation by the husband is for any cause impossible. Min. Inst. vol 1, 242. Edmond Smith occupies the position of a person born in wedlock, and where access by the father is neither disproved nor *denied*.

The attack upon the legitimacy of Edmond Smith by his maternal kindred, in this controversy over his property, is made upon the admission in effect of all that has been said herein.

It is abundantly proved and not denied, that Allen Smith and Mary Bell were colored persons, living together as husband and wife when the act of February, 1866, was passed; that Edmond Smith was the child of the woman, at least, born before that time, and living with the parties as their child, claimed to be their child by both parents, taking the father's name, and growing up in the household as their child, educated

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as such, recognized as such, living and dying as such, being called son by the father, and calling the husband of his mother father.

Unrecognized, uncared for, unnoticed by this Randall Austin in any way whatever, and no claim made concerning him by Randall Austin, until after his death, Randall Austin claims his paternity only to stamp him with bastardy. There are numerous witnesses who testify in the cause, however, who assert the belief that Randall Austin was actually the father of Edmond Smith, and some of these are most respectable. They assert that Mary Bell had a child by Randall Austin before the birth of Edmond, which child was called and known as Ruth Austin, and was admitted to be the child of Randall Austin, and that Edmond also was so considered.

Let us, however, reflect that this mystery of the paternity of Edmond Smith has been settled long years ago by the only competent authority; the mother then living, now in her grave, gave authoritative solution to the problem, in which all parties interested or concerned acquiesced for more than a quarter of a century, and which is only questioned when the dead child's property is matter of contention.

The charge now, that in moments of heat or irritation, Allen Smith charged Edmond Smith with bastardy, is sufficiently met by the statement that Allen Smith himself gave emphatic contradiction and refutation to these reproaches by the unquestioned acts of his whole life towards this boy and his mother.

There is no evidence in the record which tends to prove no access or impossibility of procreation from any cause, and the child thus born in what the law has made a sort of coverture of the parents, must be deemed as the law commands, legitimate, and not a bastard.

If the father had died first, and the claim of legitimacy had been made by the son, there would under this evidence, have been none to question it.

In giving full force and effect to this law, so wise and hu-

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mane, and so beneficent, it is the duty of the court to so construe the law as to advance the remedy and extend the relief, rather than to curtail either, and setting its face against the charge of bastardy, hold it to the well established rules that govern that question, with all the presumptions against it.

The circuit court having sustained this charge of bastardy in the decree complained of, the same must be reversed and annulled, and the cause remanded to the said court for further proceedings to be had therein, and with directions to grant the relief prayed for in the bill of the appellant, the plaintiff in that court, and to cause the estate of the said Edmond Smith to be duly ascertained and settled, and the balance to be paid over to the said Allen Smith, the father of said Edmond Smith, who is his heir at law and entitled to his estate.

DECREE REVERSED.

Wytheville.

SHACKLEFORD v. BECK.

JUNE 25TH, 1885.

1. CONSTRUCTION OF STATUTES—*Mechanic's liens*.—The remedy by lien under Code 1873, chapter 115, sections 2, 3 and 4, is a creature of statute unknown to the common law; and in order to entitle a contractor to its benefit, he must strictly pursue the statute.
2. IDEM—*Account of work and material—Definition*.—The statute requires that a contractor seeking to secure the benefit of its provisions, shall file in the clerk's office an account (which is an itemized or detailed statement of the transactions to which it relates) of work done and materials furnished; and, therefore, a paper in the following words, *viz.*: "To balance of account rendered for work and labor done and material furnished for your house," is not sufficient to create the lien provided by the statute.
3. IDEM—*Actual notice unavailing*.—The contractor, having failed to secure a lien on the house by his omission to fulfill the requirements of the statute, a purchaser of the house from the owner is not affected with liability for the contractor's claim, by reason even of actual notice of the account thereof.

Argued at Staunton and decided at Wytheville.

Appeal from three decrees of circuit court of Clarke county, one rendered in vacation, August 1, 1883, in the cause of John H. Shackelford *against* C. A. Beck and others; another rendered May 23, 1884, in the consolidated causes of Shackelford *against* Beck and als, and of Candler *against* Russell.

The object of the first-named suit was to enforce a mechan-

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ic's lien on a house built by Shackleford for Beck in Berryville, which, after the recordation of what Shackleford deemed an account in the clerk's office, for the purpose of acquiring a mechanic's lien on the house Beck sold to Candler. At the hearing the circuit court decreed against Shackleford, who appealed from the decree.

Opinion states the case.

Marshall McCormick, for the appellant.

A. Moore, Jr., for the appellee.

FAUNTLEROY, J., delivered the opinion of the court.

The transcript of the record of these causes (which were virtually one), shows the following facts: The appellant, who is a carpenter and general contractor, under a written contract, dated March 1st, 1882, built for the appellee, C. A. Beck, on his lot in the town of Berryville, in the summer of 1882, a frame dwelling-house, for the contract price of \$927. During the progress of the work, some changes were made in the plan, necessitating extra-work, for which extra-charges were made to the amount of \$105. The house was completed and turned over to the owner, C. A. Beck, on 29th September, 1882; and an account was rendered to the said Beck by the appellant, which shows the work done and the material furnished; and, after crediting the partial payments, strikes a balance due of \$667.

On the 6th October, 1882, appellant filed, in the clerk's office of Clarke county, a paper in the following words, viz: "To balance of account rendered, for work and labor done, and material furnished, for your house;" and he made affidavit to the correctness of it, and appended to it a statement, declaring his intention to claim the benefit of the lien given by law to mechanics. This paper was duly acknowledged and admitted to record.

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C. A. Beck, the appellee, in November, 1882, about two months after the recordation of this aforesaid paper, sold and conveyed the said property to L. W. Candler, for the consideration of \$1500, of which he paid in cash \$750 to McDonald and Moore, attorneys for the vendor, Beck, and retained in his hands the residue to meet certain liens upon the property. To the December rules, 1882, of the circuit court of Clarke county, the appellant filed his bill, alleging his lien upon the property, and asking its enforcement; and, in the alternative, alleging the non-residence of C. A. Beck, and that both Candler, and McDonald and Moore, had money in their hands belonging to him, and praying that it might be attached and subjected to his debt. Candler and Moore both answered the bill, and attack the validity of appellant's lien.

The question involved in the controversy is, whether the appellant duly complied with the requirements of the law in filing his account, as embodied in the paper aforesaid, filed by him, under the 3rd and 4th sections of chapter 115 of the Code of 1878?

The judge of the circuit court was of the opinion that the said paper relied on by the appellant to sustain his lien, was "invalid and ineffectual for such purpose, because it is not drawn and recorded as the law requires, and that the relief prayed for in said bill, so far as it is based upon said paper, should be denied, and doth so decide."

Sections 2, 3 and 4 of chapter 115 of the Code of 1878, provide the machinery by which a mechanic or general contractor may avail himself of the lien there given. There have been several amendments of these sections, but they relate only to the *time* within which the account must be filed in the clerk's office. Two modes of securing a lien are provided: one, under the second section, by recording the written contract, when there is one; and the other, under section four, by filing in the clerk's office a true account of the work done or material furnished, sworn to by the claimant, with a statement attached, declaring

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his intention to claim the benefit of the lien, and setting forth a brief description of the property. A mechanic may proceed under either the one or the other of these modes; and this whether there be a written contract or not. *Merchants & Mechanics Savings Bank v. Dashiell*, 25th Gratt. 621.

The proceeding in this case was under the 3d and 4th sections, obviously for the reason that the recordation of the written contract would not have covered the *extra work*. The appellant elected to proceed under the 3d and 4th sections; and the question to be determined is, whether he complied with the conditions prescribed in these said sections?

The 3d section enacts, "All artificers, builders, mechanics, lumber-dealers, and others performing labor or furnishing materials for the construction, repair or improvement of any building or other property, shall have a lien, as hereinafter provided, upon such property," &c.

The 4th section prescribes what shall be done by one seeking to secure the benefit of the provisions contained in the 3d section, as follows: "A general contractor, wishing to avail himself of the lien given him by the preceding section, shall file, within thirty days after the completion of the work, in the clerk's office of the county or corporation court of the county or corporation in which the property upon which a lien is sought to be secured is situated, * * a true account of the work done or material furnished, sworn to by said claimant or his agent, with a statement attached signifying his intention to claim the benefit of said lien, and setting forth a brief description of the property upon which he claims the lien. It shall be the duty of the clerk in whose office such account and statement shall be filed, as hereinbefore provided, to record the same in a book kept for that purpose; and from the time of such filing all persons shall be deemed to have notice thereof."

The appellant contented himself with filing with the clerk a statement of a *balance of money due per account rendered*—previously to *C. A. Beck*. To comply with the statute, the account

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need not have been rendered to Beck; but it must have been filed in the clerk's office and *recorded* by the clerk. The language of the statute is clear, simple and unambiguous, and whatever may have been the reason for requiring the contractor to file his account for recordation, it has prescribed in express, plain and unmistakable language, *the way*—and the *only way*—in which the purpose it had in view can be effected. There was no such lien, as that provided for by this statute, known to the common law, or to the courts of equity. It is purely a creation of the statute, and it must be availed of, if at all, upon the terms and conditions which the statute prescribes.

The appellant, in his petition for a supersedeas, says: "The statute requires a *true* account—not an *itemized* account; and an account may be true though it be not *itemized*." It is difficult to conceive how, without *items*, there can be an account—which is an itemized or detailed statement of the transactions to which it relates. But the difficulty in this case is not alone that it is not an itemized account, but that it is not an account of the things required by the statute—of *work done* and *material furnished*. But if it be true, as insisted, that when a contract is made in gross for the erection of a building, and supplying the material entering into its construction, the law is complied with by filing a statement of the amount due and owing for the work, it is not applicable in this case, because a considerable portion of the work was done, and material furnished, under verbal contract or contracts, outside of and not included in the written contract with Beck; all of which are embraced in the itemized account rendered by appellant to Beck, but which account was not filed by appellant in the clerk's office to be recorded as the law requires. It was indispensably necessary for appellant to have filed this account in the clerk's office, and the law makes it the duty of the clerk to record it, so as to affect all persons with notice of the lien claimed, and to warn and protect all subsequent purchasers or incumbrancers. *Boston & Co. v. C. & O. Railroad Co.*, 76 Va. 182.

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Philips in his *Mechanics' Liens*, section 349, page 576, says: "Many reasons for such explicitness in the notice as to the character of the work, and the amount and character of the materials contributed to the building are apparent. It prevents fraud on the part of the sub-contractor, and collusion by the contractor; enables the owner to ascertain the correctness and reasonableness of the demands; and gives the most definite information to purchasers and incumbrancers."

The statute now under consideration extends to certain classes of operatives and others of the people embraced in its provisions, a security for their claims, that no other class enjoys; and it is no hardship, in consideration of this, to require them to comply with the terms upon which the benefaction is offered to them. The feature of the mechanic's lien law, now under consideration, is not peculiar to the Virginia law. Many of the states of the Union have precisely the same provision (see *Maryland Code*, 1878, pp. 695-702, sections 11 and 9), and in some of them the question which this court is asked to determine in this case has been considered and decided.

In the case of *Davis v. Livingston*, 29 California, it is said, "The remedy is an extraordinary one, and, therefore, all the provisions of the act must be strictly complied with." (Citing *Walker v. Hauss-Hijo*, 1 Cal. 185; *Bottomly v. Grace Church*, 2 Cal. 91.)

In the case of *Noll v. Swineford*, 6 Penn. 187, Henry Noll, (carpenter) of the township of Penn, in the county of Union, and state of Pennsylvania, filed his claim for \$579.65 as well against a certain brick building or house of worship, erected on part of lot No. 104, as the piece of ground or curtilage appurtenant thereto situate, etc.: which sum of \$579.65 the said Henry Noll claims to be due him for carpenter work and labor done and performed in and about the erection of said building as a carpenter, and for materials, to-wit: lumber furnished by the said Henry Noll between the 29th day of June, 1843, and the 23d February, 1844, etc. Bell, J., after instructing the

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jury that the claim filed under the mechanic's lien law of 1836, for materials furnished, and work and labor done, must state the amount claimed for each as a distinct item, or the omission will render it totally invalid, says, "It has been felt, that the extraordinary remedy afforded by our laws to mechanics and material men requires to be properly guarded, to prevent it from becoming a source of unjust annoyance and injury to those whose property is liable to be made the subject of its action. It has accordingly, from time to time, attracted legislative attention, until the fruit of former experience was embodied in the act of the 16th of June, 1836, which provides, *inter alia*, that the claim or statement filed in the office of the prothonotary shall set out the 'amount or sum claimed to be due, and the nature or kind of the work done, or the kind and amount of materials furnished, etc., as the case may be.' As this statute confers a large license upon the class of meritorious citizens whose interests it is intended to advance, our courts have found it necessary, for the protection of others, to hold them to at least a substantial compliance with the requirements of the acts of assembly. This observance is, indeed, absolutely essential to the safety of owners, purchasers and other lien creditors, as furnishing some *data* by which, in case of dispute, they may be enabled to search out the truth. The clue may be an imperfect one, but in this consideration will be found additional reason why it should be afforded to those who otherwise are left to grope in obscurity, without even a glimmer of light by which to direct research. As the law calls for nothing unreasonable at the hand of him who would fasten an incumbrance upon the property of his neighbor, no just ground of complaint is afforded by insisting upon a rigid adherence to its provisions. The information it exacts is, or ought to be, entirely within the power of the creditor to give, and an omission to put it on the record is, therefore without excuse. *Rehrer v. Zeigler*, 3 Watts and Serg. 258; *Thomas v. James*, 7 Watts and Serg. 381. *Witman v. Walker*, 9 Watts and Serg. 186.

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“Indeed, the great object of the statute in pointing out the characteristics of the statement to be filed, would, in the end, be utterly defeated were we to indulge the laxity of practice which ignorance and carelessness conspire to introduce and perpetuate. It is manifest that the act contemplates work and labor done, and materials furnished, as distinct and separate items, which, to be sure, may enter into and make part of the same claim, but not necessarily so, and, when so, not properly to be confounded or treated as one. The amount claimed is to be set out; and the spirit of the act, looking to its evident object, demands that this should be done in reference to each subject forming a distinct matter of account. The provision fails of perfect satisfaction by the averment of a sum in gross, for the end sought is a check upon fraud and imposition; and to secure this, it is almost as important that those interested in the building to be encumbered, should know the extent of the claim springing from each specification, as that they should be informed of the whole amount demanded.” In the case of *Carson v. White*, 6 Gill. 17, the court says: “No mechanic has, in virtue of the act of assembly, a lien on the house which he has built or repaired, unless he has filed in the office of the clerk of Baltimore county court, a statement of his demand, and in that statement has given, not only the sum due, but also the nature or kind of the work done, and the kind and amount of the materials furnished, and the time when the materials were furnished and the work done. The mechanic or other person, then, who would claim a lien, in virtue of this act of assembly, in his statement to be filed in the office of Baltimore county court, must not only state the sum claimed, but must also, in the statement to be filed there, for the inspection and scrutiny of all persons who are or may become interested in the premises, give a bill of particulars, whereby all who may be interested can ascertain, not only the amount demanded, but the correctness and reasonableness of the demand. The items must be furnished, in

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order that other creditors and persons interested may know for what services and what materials the sum alleged to be due is claimed, and thus have an opportunity of proving the injustice or extravagance of the demand. All this must be done in terms sufficiently explicit and comprehensive, in order to prevent the frauds which otherwise might be practised upon others."

In the case of *Trustees of the German Lutheran Church v. Heise & Co.*, 44 Md. 454, the claim was for materials furnished, and the notice of the intention to claim the lien states the amount of the claim as charged in an itemized account, but "failed to state what the claim was for, whether work or materials." The court says, "As decided in the case of *Thomas v. Barber*, 10 Md. 380, the object of the notice is to impart information to the owner of the amount and character of the claim intended to be fixed as a lien upon the property, so that he may protect himself in his future dealings with the contractor. The requirement of the law in this respect imposes no hardship upon the party asserting the lien, but only secures to the owner as a means of protection what the legislature intended for his benefit. The notice here would seem to be fatally defective."

In the case at bar, if the appellant has failed to secure the benefit of the statute, such failure is due wholly to want of attention to the express and plain provisions of the law. We do not think that the circuit court erred in holding that the paper filed with complainant's bill, as Exhibit No. 1, whereby he sought to secure a mechanic's lien upon the property referred to in the said bill, is invalid and ineffectual for such purpose, because it is not drawn and recorded as the law requires, and that no lien was created upon the property of Beck, the appellee, by appellant filing in the clerk's office the said paper; and that L. W. Candler purchased the property free and discharged of any lien or incumbrance in favor of the appellant. But although Candler, the purchaser, cannot be affected with notice by implication of law, because of the failure to file and

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record the statement and account for labor and material as the law prescribes, yet it is insisted by appellant that Candler and Moore, now interested in the property, or the proceeds of it, had actual notice of appellant's claim. There is not any evidence in the record even tending to show that either of them knew of or suspected the existence of appellant's claim, until after their rights had attached to the property and its proceeds; and the allegations in the bill on this point are expressly denied in the answers of both Candler and Moore.

But suppose, in fact, they did have notice, would that have cured the error or failure of appellant to file his account and statement according to the requirement of the statute? Suppose appellant had actually showed the items of his account to Candler, the purchaser of the property, and not filed it in the clerk's office at all, could he thereby assert a lien upon the property? The question in the case is, did appellant proceed according to law so as to acquire a lien on the property under the third and fourth sections of the statute?

Candler is a complete purchaser. He paid to Beck all the purchase money, reserving, by the contract, enough to pay the liens which he assumed to pay by the contract; and he has received his deed for the property. Subsequent leinors, Moore, Russell, and Riely & Tucker, have all acquired claims on the fund, without notice of appellant's claim, and for valuable consideration. They have been diligent and active in asserting their rights; he has failed to pursue the plain and express provisions of the statute. Appellant complains of the decree rendered in the court below in the suit of Candler v. Russell, heard with this cause of Shackleford v. Beck, &c. This was a decree perpetuating an injunction against the enforcement of a judgment in favor of Russell against McDonald and Moore, out of the purchase money still in the hands of Candler, reserved expressly to pay liens upon the property obtained before Russell's judgment; and of this he cannot complain.

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We think there is no error in the decrees complained of, and they must be affirmed.

LACY, J., and HINTON, J., concurred with FAUNTLEROY, J.

LEWIS, P., and RICHARDSON, J., dissented.

DECREES AFFIRMED.

Wyntheville.

NEEL & AL. v. NEEL & ALS.

JUNE 25TH, 1885.

SPECIFIC PERFORMANCE—*Case at bar.*—In 1850 R. N. conveyed to S. lands in trust to secure debt to H. In 1874 a balance remained due, and trustee advertised sale. R. N., then old and feeble, asked his son, R. R. N., to pay the debt, and to take the land as his own, on condition of maintaining R. N. and wife during life. R. R. N. agreed, paid the debt, took possession of the land as his own, R. N. and wife making their home with and being maintained by him for seven years. But in 1881, R. N. conveyed the lands to G. H. N. and T. J. N. on the same conditions,—they having full notice of the contract of R. N. with R. R. N. The grantees in the last conveyance instituted suit, setting up the deed of 1881, and praying for a deed to them from the trustee. R. R. N. answered, and the latter filed his cross-bill, setting up his contract, its part performance, and his readiness and ability to perform the same on his part, and praying for cancellation of the deed of 1881, and for a conveyance from trustee to himself.

HELD ;

By virtue of his contract, his payment of said balance, his possession and his part performance, R. R. N. has acquired an equitable title to the lands, which he has a right to have specifically enforced in equity.

Appeal from decree of circuit court of Tazewell county, entered at its May term, 1883, in a chancery cause wherein G. H. Neel and T. J. Neel were complainants, and R. R. Neel, Robert Neel, S. S. Dinwiddie and Joseph Stras, were defendants.

Opinion states the case.

A. J. & S. D. May, and *Henry & Graham*, for the appellants.

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H. C. Alderson, for the appellees.

FAUNTLEROY, J., delivered the opinion of the court.

This is an appeal from a decree of the circuit court of Tazewell county, rendered at the May term, 1883, of the said court, in a chancery cause therein depending, in which G. H. Neel and Thomas J. Neel are complainants, and R. R. Neel, Robert Neel, S. S. Dinwiddie and Joseph Stras, are defendants.

On the 24th day of April, 1850, Robert Neel, the father of complainants, executed and delivered to Joseph Stras a deed of trust, whereby he conveyed to said Stras two tracts of land, situate in Tazewell county, Virginia, one of said tracts containing 150 acres, and the other 54 acres, in trust, to secure the payment of a debt of \$230, due by said Robert Neel to E. G. Harman, with interest from the said 24th day of April, 1850, and payment of the costs and charges for the drawing and recording of the said deed.

The said indebtedness secured by this deed of trust was paid off in instalments, from time to time, by the said Robert Neel, except a balance of about \$75, for which balance, remaining due and unpaid in 1874, S. S. Dinwiddie, who had been substituted as trustee by the county court of Tazewell county, in the stead of Joseph Stras, advertised the sale of the aforesaid lands, under the deed of trust, at the instance and request of the personal representative of the creditor, E. G. Harman, deceased. Robert Neel obtained an injunction restraining this sale; but it was, upon the hearing, dissolved; and the said Dinwiddie proceeded to sell the land. Robert Neel, old and feeble, was unable to raise the money to pay the debt, and he proposed to his son, R. R. Neel, to pay the debts secured by the deed of trust, and to take the land as his own, upon condition to maintain him, the said Robert Neel, and his wife, during life. To this R. R. Neel agreed; and he, by an arrangement, became the purchaser of the land, which was conveyed to him by deed from

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the trustee, S. S. Dinwiddie, dated November 16th, 1874, and recorded in the clerk's office of the county court of Tazewell county, on that date, by virtue of which the said R. R. Neel took possession and enjoyment of the land as his own property, and his father and mother, the said Robert Neel and Nancy his wife, made their home with him, and were maintained by him for a continuous period of seven years, until a few weeks before the institution of this suit, when the said Robert Neel went to the home of one of the complainants.

On the 21st of March, 1881, Robert Neel executed and delivered a deed to Granville H. Neel and Thomas J. Neel, by which he conveyed to them this same land, for and in consideration of the agreement and undertaking of the said G. H. Neel and Thomas J. Neel to take care of and comfortably provide for and maintain the said Robert Neel and Nancy Neel his wife, for and during their lives, and for natural love and affection, and one dollar in hand paid, with covenants of general warranty. G. H. Neel and Thomas J. Neel filed the original bill in this cause, setting up this aforesaid deed of March 21st, 1881, from Robert Neel to them for the land; praying to have the deed aforesaid from S. S. Dinwiddie, substituted trustee, of November 16th, 1874, to R. R. Neel, vacated and set aside; and to have a deed decreed to be made to them by Joseph Stras, the legal and proper trustee, conveying to them the legal title to the said land. R. R. Neel, Robert Neel, S. S. Dinwiddie, and Joseph Stras, the original trustee, were made defendants. The bill was answered by the said R. R. Neel and Robert Neel; and the said Robert Neel also filed his cross-bill in the cause, making the said R. R. Neel defendant thereto. Various proceedings were had in the cause, which terminated at the May term, 1883, of the said circuit court, in the decree complained of, dismissing the original bill of complainants, with costs, and vacating and setting aside the deed of November 16th, 1874, from S. S. Dinwiddie, the substituted trustee, to R. R. Neel, for irregularities in his appointment and substitution as trustee; and requir-

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ing Joseph Stras, the original trustee, in whom the legal title to the land was vested, to convey the same to the said R. R. Neel, stipulating in the deed that said R. R. Neel shall properly support and maintain the said Robert Neel and Nancy his wife, during their lives and the life of the survivor. The said Joseph Stras was directed to retain a lien, upon the face of the deed, upon the land conveyed, for the faithful performance of the covenant to maintain and support the said Robert Neel and Nancy his wife, by the said R. R. Neel. And the court further decreed that the cross-bill of Robert Neel be retained and continued in the cause; and that Joseph Stras report his action under the decree to the court.

From this decree this appeal is taken; and the errors assigned are, 1st, the circuit court erred in dismissing complainants' bill, and in refusing to grant them the relief specifically prayed for; and, 2ndly, in decreeing that R. R. Neel had any equitable title, or other, to the lands in controversy; and in directing the trustee, Joseph Stras, to convey the lands to R. R. Neel, as set forth in the decree.

The answer of R. R. Neel to the original bill of complainants expressly denies every material allegation in the bill, both of alleged fraud in the procurement of the contract, and of failure to perform his stipulations in the contract; and alleges possession for more than seven years of the lands, under the contract, and part performance; and avers his anxiety, ability, and constant readiness to fully perform and carry out the contract in good faith. The answer of Robert Neel to the original bill expressly admits the contract made by him with R. R. Neel as set up in the answer of R. R. Neel; and the proof in the record shows, that both Robert Neel and Nancy his wife had lived with and been maintained by R. R. Neel, upon the terms of the contract, for a period of over seven years from its date; and that Nancy, the wife of Robert and mother of R. R. Neel, is still living with him. That Robert Neel is aged, feeble and childish; and had, either of his own caprice or by instigation,

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withdrawn himself from the house and home of R. R. Neel, who is ready and willing and able to receive him again, and to support and comfort his few remaining days upon earth.

The answer alleges, and the proofs show, that the complainants G. H. Neel and T. J. Neel, knew of the making and subsisting, of the arrangement contracted between Robert Neel, their father, and R. R. Neel, their brother; that they knew of his purchasing and holding the land under the sale and conveyance made to him by the trustee, Dinwiddie; that it was all done with their knowledge, consent and concurrence; that they did nothing to save the land from sale and sacrifice for the debts secured by the deed of trust; that they stood by without contributing towards the support of Robert Neel and his wife, for a period of more than seven years; and then, when the said Robert Neel was old and feeble and childish, they obtained from him a deed conveying the land in controversy to themselves, in fee, upon no consideration other than the stipulation to support the said Robert Neel for the few remaining days of his life.

R. R. Neel, by virtue of his contract with Robert Neel, and the payment of the balance of the debt secured by the deed of trust, and by his possession of the land, and part performance of the contract, by the maintenance of Robert Neel and his wife for seven years, acquired an equitable title to the land, which he has a right to have specifically enforced in equity; and which the decree of the circuit court of Tazewell county does enforce upon the terms of the contract: and finding no error in the decree complained of, it must be affirmed.

DECREE AFFIRMED.

Wyntheville.

ROANOKE LAND AND IMPROVEMENT CO. v. KARN & HICKSON.

SAME v. SNEAD & WINSTON.

JUNE 25TH, 1885.

1. APPELLATE COURT—*Record—Certificate*.—Nothing, not made part of the record by bill of exceptions, or by order of the court, can be regarded as such by the appellate court. The clerk can add nothing to the record, and his certificate that a deposition or other paper copied by him, was the evidence whereon the judgment was founded, is no part of the record.
2. IDEM—*Pleadings—Demurrer—Jeofails*.—Judgment will not be reversed for defect, imperfection, or omission in the pleadings, unless in court below there was a demurrer. Code 1873, ch. 177, § 3. But a failure to state any cause of action at all, is not cured by the statute.
3. MECHANICS' LEIN—*Sub contractor—Owner*.—In suit of sub-contractor against owner for materials furnished general contractor, it is unnecessary to allege that any part of the price agreed to be paid remained due to latter from owner when notice was given. Acts 1874-5, p. 437, § 5.
4. IDEM—*Notice*.—The mechanics' lien law as amended by act of 1874-5, p. 437, § 5, does not require sub-contractor to notify owner at the time the labor is done or the materials are furnished: it is sufficient if the notice be given at any time thereafter, and within twenty days after the building has been completed, or the work otherwise terminated. But he is not obliged to wait until other work on the building, with which he has no concern, is performed, before he gives his notice.

Error to two judgments of circuit court of Roanoke county; rendered 9th October, 1884, the first in the action of assumpsit brought by Karns & Hickson against the Roanoke Land and

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Improvement Company, and the second in the action of assumpsit brought by Snead & Winston against the same company, for materials furnished by the plaintiffs respectively, as sub-contractors, to Julius C. Holmes & Co., as general contractors, to be used by them in constructing a certain building owned by the said company. The judgments were for the plaintiffs respectively, and to these judgments the said company obtained from one of the judges of this court, writs of error; which writs were heard together.

Opinion states the case.

S. Griffin, J. Allen Watts and Wm. Gordon Robertson, for the plaintiff in error.

Burks & Burks and W. W. Larkin, for the defendants in error.

LACY, J., delivered the opinion of the court.

The defendants in error instituted their action of assumpsit in the circuit court of Roanoke county, in September, 1883, against the plaintiff in error. The action was in each case for a certain sum claimed to be due them, on account of certain materials furnished by them to a certain firm of contractors, to-wit, Julius C. Holmes & Co., to be used by them in the construction of a certain building of which the plaintiff in error was the owner.

Both parties having waived a jury, the issue, both as to matters of fact and as to matters of law, was decided by the judge in each case, who rendered judgment for the defendants in error, Karn & Hickson, for \$1000 and costs, and for the defendants in error, Snead and Winston, \$1002.73 and costs.

The plaintiff in error in each case moved the court to set aside the said judgments respectively, as being contrary to the law and the evidence, which said motion was overruled in each case. There was no exception taken at the trial in either case, but the plaintiff in error copied the record in each

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case, and presented his petition in each case for a writ of error, on account of errors to be found on the face of the plaintiff's declaration in each case, which was awarded in each case on the 10th day of December, 1884, by one of the judges of this court.

The case must be heard and considered in this court upon the errors apparent upon the face of the record. In *White v. Toncray*, 9 Leigh, Judge Tucker says: "The record is made up of the writ (for the purpose of amending by if necessary); the whole pleadings between the parties; papers of which profert is made or oyer demanded, and such as have been specially submitted to the consideration of the court by a bill of exceptions, a demurrer to evidence, or a spécial verdict, or are inseparably connected with some paper or evidence so referred to. These, with the several proceedings at the rules, or in court, until the rendition of the judgment, constitute the record in common law suits, and no others." *Mandeville v. Penn*, 6 Call, 78, 83; cited and approved in *White v. Toncray*, 9 Leigh, 351.

The record of a trial, in action at law, does not of itself contain the incidents which invest such occasions frequently with a powerful dramatic interest. It takes no notice of the rulings of the court in admitting or excluding evidence, nor of instructions as to the law given by the court to the jury, much less of the testimony itself, or of the arguments of counsel. It confines itself to a brief abstract, setting forth nothing but the pleadings, the issue, the impaneling of the jury, or the waiver of the jury, and the submission of matters of fact to the court, the verdict and the judgment, or the judgment alone, where the jury is waived.

If the court is supposed to err in any part of its conduct during the trial, in admitting or excluding evidence, in the instructions it gives to the jury as to the law, or otherwise, the record is made to embrace so much of the proceedings as will enable an appellate court to understand, and if need be correct, the ruling and judgment of the court below, by means of a bill of

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exceptions, which is a statement attested by the signature of the judge of the action of the court and of the circumstances which attended it.

The whole object of a bill of exceptions being *to exhibit upon the record* the supposed mistakes of the court which tries the cause, which otherwise do not appear upon the record, and cannot be brought before the appellate court to be there reviewed and corrected if erroneous.

At common law no such device as a bill of exceptions existed, so that if one were aggrieved in the particulars indicated he was without remedy. It was first allowed in England by statute Westm. II, 13 Edward I, C. 31, which has in substance been enacted in Virginia, our statute providing that, in the trial of any case at law, in which an appeal, writ of error or *supersedeas* lies to a higher court, a party may except to any opinion of the court, and tender a bill of exceptions, which (if the truth of the case be fairly stated therein) *the judge shall sign, and it shall be a part of the record.* If no such exceptions are taken to any supposed errors of the court which tries the case, these acts are not in the record, and cannot appear in the transcript thereof, and the party aggrieved remains as at common law without relief. 4 Min. Inst. 728-9. And this applies to the action of the court in refusing to set aside the judgment, and grant a new trial, because the same is contrary to the law and the evidence. The evidence cannot be reviewed by the appellate court, because it is not in the record, and is not made a part by bill of exceptions in any form, and a deposition taken in such case is not a part of the record, although copied in the transcript and certified by the clerk; it is not the province of the clerk to add anything to the record. *Cunningham v. Mitchell*, 4 Rand. 189; *Bowyer v. Chestnut*, 4 Leigh, 1.

The deposition filed in the case of *Karn & Hickson*, and certified by the clerk, and the affidavit in the case of *Snead & Winston*, the notices in each case copied and certified by the clerk, cannot be considered by this court. They are not made

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a part of the record by the court, and it is not the province of the clerk to make anything a part of the record; his province is to copy the record as it is. In *Cunningham v. Mitchell*, Judge Green says: "The certificate of the clerk that these papers were the evidence upon which the judgment was founded, cannot be received as a part of the record. His certificate to that effect can have no more effect than that of any other individual. He can certify that such records exist in his office, but not what use was made of them. That ought to have been shown by the record; and it was the duty of the party wishing to avail himself of the fact to have made it a part of the record." *Cunningham v. Mitchell*, *supra*, and *Preston v. The Auditor*, 1 Call, 471.

They are no part of the record, the clerk's certificate that they were read and filed cannot be received as evidence of that fact; for the appellate court can never know what took place at the trial by the clerk's certificate, that is not within his province.

The evidence produced upon the trial can only be known by its being spread upon the record by bill of exceptions, or by the certificate of the judge himself. The very object of the institution of bills of exceptions, was to enable the party to spread upon the record the matters that occurred at the trial; the improper evidence introduced, the instructions asked, the opinions given, and other matters of which the party could not otherwise avail himself in an appellate court. 2 Bac. Abr. 527; 2 Inst. 426. Unless this is done, the court sees nothing but the process, the pleadings, the verdict and the judgment (or the judgment when the jury was waived by the parties). The certificate of counsel affords no evidence of opinions expressed, or evidence given, nor the certificate of the clerk of the papers produced before the jury, or the depositions read in the cause. *Bowyer v. Chestnut*, 4 Leigh, 1. Opinion of Tucker, P.

Mr. Minor says, as to bills of exceptions: The record proper, is nothing but the formal allegations or pleadings on either side, the issue, the impaneling of a jury, the verdict and the

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judgment, the mere lifeless skeleton as it were of the cause. The occurrences in court during the trial, all that impart life, animation and interest to the proceedings, are unnoticed. No vestige remains of the examination of the witnesses, the instructions and opinions of the court, or the behavior of the jury. But either party may catch these incidents "living as they arise," and fix them in the record, so that they may be perused on review by an appellate court (which can never look outside of the record for the history of the case); and if any error appears in the course of the proceedings that court may reverse the judgment, and take the steps necessary to correct the wrong done. 4 Min. Inst. 742.

All this is clear, both upon reason and authority.

Let us now proceed to consider the errors assigned upon the face of the record itself.

1st. That the plaintiffs' declaration contains no allegation that any part of the price agreed to be paid for the building remained unpaid and was due from the owner to the general contractor at the time the notice mentioned in the declaration was given.

2nd. That the notice required by the statute should be given at the time the materials were furnished, or certainly in a reasonable time thereafter; but the declaration merely states that notice was given before the building was completed, or the work thereon otherwise terminated, which is insufficient; while the statute provides that the affidavit stating the amount due to the sub-contractor and remaining unpaid, may be given at any time within twenty days after the building is completed or the work thereon otherwise terminated, it does not so provide with regard to the notice, but the evident intention of the statute is, that notice shall be given as soon as the materials are furnished.

3d. There is no liability on the owner to claims of sub-contractor until after the building is completed, or the work thereon otherwise terminated, for no liability arises until the

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affidavit required by the 5th section is furnished, which, under said section, is required to be given "within twenty days after such building or other improvement is completed, or the work thereon otherwise terminated," and that the affidavit in this case is alleged to have been given at the same time as the notice, to wit: before the building was completed, or the work thereon otherwise terminated.

As to these assignments it may be observed, that the declaration was not demurred to in the circuit court.

These are alleged defects in the declaration. If they be such, why could they not have been availed of by demurrer? If so, can they constitute ground for the reversal of the judgment in this court?

The statute provides that no judgment shall be reversed on appeal for any defect, imperfection or omission in the pleadings, which could not be regarded on demurrer, or for any other defect which might have been taken advantage of on a demurrer, but was not so taken advantage of. Code 1873, ch. 177, sec. 3. The statute is held to cure a defective statement of a cause of action. The cause of action set forth in the declaration, arises under the provisions of chapter 115 of the Code, section 5, as amended in the Acts of 1874-5, and section 6 of said chapter. The statute would not validate a declaration which did not state any cause of action at all; it cures the error in a declaration which defectively states a good cause of action. 4 Min. Inst., 766; *Laughlin v. Flood*, 3 Munf., 273; *Boyle's adm'r v. Overby*, 11 Gratt. 202.

This statute controls and limits the powers of this court in reviewing errors alleged to exist, or appearing upon the face of the record. If the error was not excepted to in the mode prescribed by law, in the lower court, the judgment cannot be reversed in this court on account of such error.

These alleged errors not having been noticed or objected to in the court below by demurrer, the objection comes too late in

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this court. And while we might well rest our views upon the foregoing, it may not be amiss to say, that it is not in this case necessary to rest our decision solely upon that ground.

As to the first assignment of error: There is no such requirement in the statute; and while it might be matter of defence depending upon evidence in some cases which might arise, it cannot be said to be an essential allegation in the statement of a case under the statute.

As to the second assignment of error, such a construction could not be given to the statute without adding words not in the law. The 5th section provides for notice, and for affidavit within twenty days after the building is completed. The 5th section of chapter 115 of the Code provides for notice of the *probable* value of the labor *to be* performed, or materials *to be* furnished. But the law as amended omits the words "probable" and the words *to be* before the words performed and furnished, as regards respectively the labor and the materials.

The amendment excludes the idea of notice in anticipation of either, and avoids any conjectured estimate, but provides for notice only of what has been done in either regard, and for affidavit within twenty days after the building has been completed, when the *labor has been performed*, and the *material furnished*, the notice may be given, and the affidavit furnished at any time within twenty days after the building has been completed; this is the limitation provided by the law; there is no other. When the labor has been performed, and the materials furnished, there is nothing in the statute which requires the sub-contractor to wait until other work on the building, with which he has no concern it may be, is performed, before he gives his notice; under the former law, he might have been held to the obligation to give the notice in anticipation of his labor and his delivery of materials, but under the amended law as it now stands, no such inference can be drawn, and if he follows the requirements of the statute, he is entitled to his action

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against the owner of the building, on which he has performed labor, or for which he has furnished materials.

This sufficiently disposes of the third and last assignment of error, as well as of the second. There is no error in the record for which the judgment of the circuit court should be reversed, and the same must be affirmed in each case.

JUDGMENTS AFFIRMED.

Worcester.

WEBSTER v. THE COMMONWEALTH.

JUNE 25TH, 1885.

CRIMINAL PROCEEDINGS — *House-breaking — Indictment — Ownership of house.*—An indictment charging that “the prisoner, on, &c., a certain mill-house not adjoining to or occupied with the dwelling-house of F.” &c., sufficiently alleges the ownership of the mill-house to be in F., and is sufficient in law.

Error to judgment of county court of Hanover county, rendered 15th April, 1885, in the case of the Commonwealth against Mason Webster.

Opinion states the case.

Sands, Leake and Carter, for prisoner.

Attorney-General, F. S. Blair, for the commonwealth.

FAUNTLEROY, J., delivered the opinion of the court.

Webster, the plaintiff in error, was indicted, tried, convicted, and sentenced to a term of two years in the penitentiary, for a felony, in breaking and entering, with felonious intent, a certain mill-house, &c.

He pleaded not guilty, and entered a general demurrer to the indictment. The court overruled the demurrer, and the jury found him guilty. Thereupon, the accused moved the court to

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set aside the verdict and grant him a new trial, on the ground that the verdict is contrary to the law and the evidence; which motion the court overruled, and pronounced judgment and sentence. Application for a writ of error was made to and refused by the judge of the circuit court of Hanover; but the writ of error was awarded by one of the judges of this court.

The error assigned, is the overruling by the county court of the demurrer to the indictment; and the ground of the demurrer is the failure or omission to state in the indictment, with clearness and certainty, the ownership of the mill-house therein charged to have been broken open.

The language of the indictment is, that "Mason Webster, on the day of , in the year one thousand eight hundred and eighty-five, at the said county, and within the jurisdiction of the said county court of the county of Hanover, a certain mill-house not adjoining to or occupied with the dwelling-house of Frances Edmonia Newman, William C. Newman and Edmund W. Newman, there situate, in the night time, feloniously did break and enter, with intent the goods and chattels of the said Frances Edmonia Newman," &c.

We think that this language sufficiently charges the *ownership* of the mill-house broken open and entered to be in the three Newmans specified. Certainly the language embodies the statement, and the only defect is the omission of two points of punctuation, one after the word *mill-house*, and the other after the word *dwelling-house*, which any intelligent reader can supply, as, indeed, is now an imposed necessity in almost every written or printed production. The words of the indictment, taken all together, and supplied with obvious and proper punctuation at the beginning and the end of the parenthesis—"not adjoining to or occupied with the dwelling-house"—charge, with clearness and certainty, the ownership of the mill-house. *Mala grammatica non vitiat*. (See the indictment in *Speers' Case*, 17 Gratt. 570.)

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We concur with the judge of the circuit court of Hanover in refusal of the writ of error to the judgment of the county court of Hanover, and the said judgment of the county court be affirmed.

JUDGMENT AFFIRMED.

Wytheville.

STUART, PALMER & Co. v. HENDRICKS & ALS.

JUNE 25TH, 1885.

CHANCERY PRACTICE—*Report of Commissioner*.—The principle is well established, that when a question of fact is referred to a commissioner, depending upon the testimony of witnesses conflicting in their statements and differing in their recollection, the court must, of necessity, adopt his report, unless in a case of palpable error or mistake. *Bowers v. Bowers*, 29 Gratt. 697.

Appeal from decree of circuit court of Russell county, entered August 18, 1882, in the cause of W. A. Stuart, G. W. Palmer and Joseph Jacques, partners, in the name of Stuart, Palmer & Co., complainants, *against* A. L. Hendricks and als., defendants.

The bill was filed in the court below to enforce the lien of a judgment recovered by the plaintiffs, and amounting originally to the sum of \$1400. The bill admits that various payments have been made on the judgment, but alleges that a balance of \$500, or more, is yet due and unpaid. This allegation the answers deny; and upon the issue thus made, the cause was referred to a commissioner for inquiry and report. The commissioner reported a balance due by the defendants of \$313.25, and along with his report he returned the evidence upon which it was based. The plaintiffs excepted to the report, but the exceptions were overruled, and a decree was entered in their favor for the balance ascertained by the commissioner. From this decree they obtained an appeal.

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Routh & Stuart, for the appellants.

White & Buchanan, for the appellees.

LEWIS, P., delivered the opinion of the court.

The sole question is, whether the defendants are entitled to a credit of \$500, which they claim to have paid in the spring or fall of 1878. Upon this point the evidence is conflicting, but preponderates on the side of the defendants. The principal debtor, J. J. Dickenson, testifies, that in a conversation with J. F. McElheney, the plaintiffs' attorney, in the spring or fall of 1878, the latter said to him: "Give me \$500, and if on settlement it overpays the judgment, I will return you the excess;" and thereupon, he says he paid him \$500, and took his receipt, which he has lost, and which he has been unable to find, though diligent search has been made for it. This receipt he thinks he showed to the defendant, J. H. Dickenson, and the latter testifies that his impression is, that among the receipts showed him was one for \$500, paid on the plaintiffs' judgment. He also testifies, that on more than one occasion, McElheney assured him that the judgment had been settled. And the witness, W. H. Burns, testifies, that since the institution of the present suit, McElheney informed him that the judgment had been settled, or nearly so. On the other hand, McElheney testifies, that in his conversation with J. H. Dickenson, he did not mean to say that the judgment had been paid, but that he had agreed to look for payment to J. J. Dickenson. He also testifies, that he does not remember to have received from the latter a payment of \$500 on the judgment, nor does he believe that any such payment was ever made. He gives a list of the credits, and their respective amounts to which he thinks the defendants are entitled, as disclosed by an examination of his books, but admits that one of his books is lost, and was probably destroyed by fire. He is positive, however, that he paid every dollar he received on the

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judgment to one of the plaintiffs, W. A. Stuart; and the latter testifies, that he received from McElheney no such payment as that upon which the defendants rely. In this state of the proofs, the commissioner allowed the defendants the credit in question, and his action was confirmed by the decree complained of.

The case was thus materially strengthened for the defendants. For the principle is well established, as declared by this court in a recent case, that "when a question of fact is referred to a commissioner, depending upon the testimony of witnesses, conflicting in their statements and differing in their recollection, the court must, of necessity, adopt his report, unless in a case of palpable error or mistake." *Bowers' adm'r v. Bowers*, 29 Gratt. 697. And the reason is obvious: "The commissioner is confronted with the witnesses; he sees their deportment, their manner of testifying, their capacity for recalling past occurrences, whereas the court, which only sees the testimony on paper, is denied these tests of accuracy and fidelity." *Id.*; 2 Daniel's Chy. Pl. & Pr. 1299; Adams' Eq. (5th Amer. ed.), p. 726, note 2. The decree is affirmed.

DECREE AFFIRMED.

Wytheville.

LITTERALL v. JACKSON & ALS.

JUNE 25TH, 1885.

1. **SPECIFIC PERFORMANCE—*Requisites.***—The first requisite of a contract to entitle one to its specific performance in equity, is certainty and definiteness in its terms. *Wright v. Pucket*, 22 Gratt. 370.
2. **IDEM—*Married women—Contracts—Lands.***—It is well settled that a court of equity will not decree against a wife performance of her contract to convey her lands; nor against wife or husband performance of his or their contract to convey her lands.
3. **PERSONAL REPRESENTATIVE—*Powers.***—An administrator, as such, is without authority to make sale of his intestate's real estate.
4. **JURISDICTION—*County courts.***—County courts possessed general jurisdiction concurrent with circuit courts until the enactment of sections 2 and 3 of chapter 124, Code 1873, except as to sale of lands of persons under disabilities.

Appeal from decree of circuit court of Wythe county, entered 11th December, 1883, in a cause wherein George W. Litterall, the appellant here, was complainant, and George W. Jackson and als. were defendants.

Opinion states the case.

Robert Crockett, for the appellant.

James A. Walker, *William Terry* and *Jos. W. Caldwell*, for the appellees.

RICHARDSON, J., delivered the opinion of the court.

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This is a triangular contest in respect to the ownership of the land in controversy, it being so much of the 2058-acre survey granted by the commonwealth to D. B. Saunders, on the 1st day of February, 1851, as is east of the "Low-Gap" road in the county of Carroll. All of said 2058-acre survey is embraced within an older, larger survey, known as the Ruston survey, containing 240,000 acres, and, at the time of the grant for said 2058 acres, owned by the Wythe Union Lead Mines Company.

At the time of the emanation of the grant to D. B. Saunders for said 2058 acres, the Lead Mines Company had been and was engaged in serious litigation involving their title to said Ruston survey, and said company threatened to commence litigation with D. B. Saunders in respect to said 2058 acres. But, to prevent vexatious and expensive litigation, the Lead Mines Company entered into an agreement with said D. B. Saunders that in the event said company should, in the then pending litigation, establish their title to said "Ruston survey," then the said company should relinquish to said Saunders the said 2058 acres, embraced in said "Ruston survey," for the stipulated sum of \$340, to be paid by said Saunders to said company. Said company did establish its title to said "Ruston survey," but D. B. Saunders died without having carried the agreement in respect to said 2058 acres into effect.

D. B. Saunders died intestate, leaving a widow and two children, to wit: Martha A., intermarried with S. G. Saunders, and Mary, who intermarried with E. T. Osborne; and said S. G. Saunders administered upon the estate of the decedent. After his qualification as administrator, S. G. Saunders, being advised of the understanding and agreement between the Lead Mines Company and his intestate (the said company agreeing to and acquiescing therein), executed his individual bond, with E. T. Osborne as surety, to said Lead Mines Company, or its authorized agents, for the sum of \$340; which bond was dated the 11th day of June, 1866, and was made payable one day

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after date, with interest. It is conceded that the only object in giving this bond was to complete the contract or agreement between said Lead Mines Company and D. B. Saunders, in the lifetime of the latter, and thus to secure to the heirs at law and distributees of said D. B. Saunders a clear and undisputed title to said 2058 acres granted as aforesaid to said Saunders, but included in the long prior "Ruston survey" owned by said Lead Mines Company.

On the same day on which S. G. Saunders completed said contract of his intestate as to said 2058 acres, said Lead Mines Company, by its attorney in fact, Joseph J. Graham, conveyed said 2058-acre survey to Martha A. Saunders and Mary S. Osborne, the heirs at law of said D. B. Saunders, the deed reserving a lien for the purchase money.

On the 25th day of April, 1866, after the appointment and qualification as administrator of D. B. Saunders, but before his completion of the said contract with the Lead Mines Company, S. G. Saunders, as administrator of D. B. Saunders, executed and delivered to Lewis Litterall, Jr., the following paper:

"I have, as administrator of D. B. Saunders, deceased, this day bargained and sold to said Lewis Litterall, Jr., all that part of a tract of land belonging to the said D. B. Saunders, now occupied by Robert Porter, in Carroll county, and lying east of the Low-Gap road, for the gross sum of one hundred dollars; thirty dollars paid down, and the balance when a deed is made. The said Litterall accepts Robert Porter as his tenant. Said Litterall is to pay taxes on the land from this date. Also a quantity of land lying west of the Low-Gap, and on the Yellow branch, between *Loyd James* and Lewis' land, at fifty cents per acre. Said Litterall is to as much as 200 acres at that price; but said Litterall has this day paid ten dollars on , and is to have until 25th December, 1866, to determine how will takes it, which time he will pay for what the takes. Witness my hand and 25th day of April, 1866."

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This paper was signed by S. G. Saunders as administrator.

For the specific execution of this contract, the appellant, Geo. W. Litterall, filed his bill in the circuit court of Carroll county in June, 1881. Whether said contract is a proper one for specific execution by a court of equity, is the first question to be determined by this court. But, before entering upon that enquiry, it is necessary to call attention (1) to how the appellant claims the right to enforce this contract in his favor; and (2) to the chancery suit of Saunders v. Saunders, commenced in the county court of Wythe county, in 1870, and finally moved to and determined in the circuit court of said county.

First, then, as to the claim of the appellant, Geo. W. Litterall. Lewis Litterall, Jr., with whom said Saunders as administrator made said contract, or rather the paper purporting to be a contract, after taking and holding possession thereunder, of the land in controversy, and holding same for a considerable time, removed to one of the western states, where, in the year , he died intestate, unmarried and childless; and whatever claim he had, passed by inheritance to his father, Lewis Litterall, Sr., who lived in the neighborhood of this land, in the county of Carroll. Lewis Litterall, Sr., in 1873, in professed obedience to a request to that end made by Lewis Litterall, Jr., before he left Virginia, conveyed the land to his son, Clark Litterall, who, by deed of date May 12th, 1876, for the consideration therein named, conveyed the same to the appellant, Geo. W. Litterall, who claims the right to have the same specifically executed. Prior to the conveyance from Lewis Litterall, Sr., to Clark Litterall, and from the latter to the appellant, to-wit, on the 18th day of May, 1870, said S. G. Saunders and Martha A., his wife, who was one of the heirs at law of D. B. Saunders, filed their bill in the county court of Wythe county, against Jane Saunders, the widow of D. B. Saunders, and E. T. Osborne and Mary, his wife, the latter being the other child and heir at law of D. B. Saunders. The bill set forth the death of D. B. Saunders, and the administration upon his estate by said S.

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G. Saunders; and alleged that the personal estate of the deceased was inadequate to discharge the indebtedness of the estate; that the intestate died seized and possessed of several tracts or parcels of land, among them the said tract of 2058 acres; that it would be necessary to sell the land and pay the debts in order to a just and fair distribution of any residuum between the heirs at law and distributees; and that the widow and all parties in interest acquiesced in the object of the suit as set forth in the bill. And the bill in furtherance of the objects in view, asked for a settlement of the administration accounts of said S. G. Saunders.

Jane Saunders, the widow, and E. T. Osborne and Mary, his wife, jointly and separately answered the bill, admitting as true the statements therein contained, and the necessity of the sale of the lands for the payment of debts and for a fair distribution of the residue. Such proceedings were had in this suit of Saunders *v.* Saunders, that on the 17th day of March, 1870, a decree was entered therein, among other things, enumerating the several tracts of land of which D. B. Saunders died seized, declaring the necessity of a sale of the several tracts of land, (among them the 2058 acres), and directing its special commissioner, Wm. Terry, to make sale of *all* of said lands and to report to court. There is in this decree no reservation or exception from the sale ordered of any portion of the 2058-acre tract. In obedience to said decree, said commissioner, on the 13th day of June, 1870, made sale of the lands, and the appellee, Jackson, became the purchaser of the 2058-acre tract, at \$455, which was reported to court, the commissioner saying in his report, in connection with this tract: "There being an estimate there was a good title for only some twelve or fourteen hundred acres in said tract, by reason of prior sales," etc. This is the first intimation from any source, of any adverse claim, by any one, to any portion of the 2058-acre tract. Commissioner Terry's report of sales, on being returned, was confirmed by a decree rendered on the 11th day of October, 1870,

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except as to the sale of the 2058-acre tract, which the court reserved for further consideration. In this attitude of the suit of *Saunders v. Saunders*, Geo. Jackson, the purchaser of the 2058-acre tract, and the appellee here, filed his cross-bill therein, setting forth the agreement between the Lead Mines Company and D. B. Saunders, in the lifetime of the latter; the death of said Saunders before that agreement was carried into effect; the execution of said bond by S. G. Saunders and L. T. Osborne to complete the agreement and quiet the title to said land; the conveyance of same by said company to the heirs of D. B. Saunders, with reservation of a lien for the purchase money; that he had become the transferee and owner of the bond for said purchase money, executed by said Saunders and Osborne to said Lead Mines Company or its agents, and claimed to set off the same, with the interest accrued thereon, against his purchase money price at which he bought said land at the sale made by Commissioner Terry; that he had paid to said commissioner a sum named, which together with said bond executed by Saunders and Osborne, as aforesaid, was equal to the purchase price at which he bought said 2058-acre tract, and insisted that he was entitled to a deed for same. To this cross-bill the widow and heirs of D. B. Saunders were made parties defendant, including the said S. G. Saunders and E. T. Osborne, the husbands of said two daughters and heirs at law.

Said defendants filed their joint and several answers, admitting the general statements of the cross-bill, and submitting to the court whether Geo. Jackson was entitled to a deed for said 2058-acre tract of land, by reason of his having discharged to the Lead Mines Company said incumbrance, and whether he was entitled to a credit for the full amount of the said note, principal and interest, against the amount of his purchase money for said tract of land.

On the 19th of November, 1870, the cause was again heard upon the papers formerly read, the cross-bill and the answers of the defendants thereto, when a decree was pronounced ascer-

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taining that the amount of the note executed by S. G. Saunders and E. T. Osborne, with the interest thereon, which had been paid off and discharged by Geo. Jackson, constituted a valid incumbrance on said land, and that said Jackson was to that extent entitled to an offset against his purchase money, and that with the amount thereof the said Jackson had paid to said commissioner an amount equal to his purchase money for said land; and said decree confirmed to said Jackson his purchase of said 2058-acre tract, and appointed Wm. Terry a special commissioner for the purpose, and directed him to make a deed for same, "with proper reservation of the rights of purchasers of portions of said tract." In conformity to said decree, Commissioner Terry, by deed dated 5th day of December, 1870, conveyed said land to Geo. Jackson, the deed describing same as "containing 2058 acres, more or less, being the same land that was patented by the commonwealth of Virginia to D. B. Saunders, by patent bearing date 1st day of February, 1851;" the deed further reciting: "But it is understood, there are within the boundaries called for by said patent some eight hundred acres, more or less, in sundry small tracts or parcels, sold and conveyed by said D. B. Saunders in his lifetime, which are not intended to be embraced in this conveyance, but only such interest as said Saunders died seized and possessed of." Thus arose the claim of the appellee, Jackson, to the land in controversy.

Later, to-wit: in April, 1881, in an action of ejectment, brought in the circuit court of Carroll county, by the appellee, Jackson, against the appellant, Geo. W. Litterall, a judgment was recovered by said Jackson against said Litterall for the land in controversy. Thereupon, said Litterall filed his bill in the circuit court of Carroll county, against said Geo. Jackson, S. G. Saunders, in his own right, and as administrator of D. B. Saunders, dec'd, and Martha Saunders his wife, E. T. Osborne, and Mary his wife, and E. Marshall, sheriff of Carroll county; and after setting out substantially the facts hereinbefore narrated in

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connection with said 2058-acre survey, the sale of that portion thereof in controversy by the administrator of D. B. Saunders to Lewis Litterall, Jr., the death of said Lewis Litterall, and inheritance from him by Lewis Litterall, Sr., the father, and the conveyance by him to Clark Litterall, and by the latter to Geo. W. Litterall, prays for a specific execution of said alleged contract, hereinbefore set out, and for a restraining order, which was granted, enjoining the said Jackson and others from the enforcement of the judgment in said action of ejectment until the further order of the court.

Geo. Jackson answered this bill of Geo. W. Litterall, utterly denying the claim set forth therein; denied that he only purchased the land west of the "Low-Gap road," as alleged; and says that he purchased under the decree of the county court of Wythe, in the suit of Saunders v. Saunders, as shown by his deed from Commissioner Terry, *all* the interest of D. B. Saunders' estate in the 2058-acre tract; and that he made said purchase, paid the purchase money, and obtained his deed, without any notice whatever of the claim of Geo. W. Litterall, or any notice of the alleged contract under which said Litterall asserts his claim. And the said respondent in his answer denies that S. G. Saunders had any interest in or authority to sell the land in controversy; and insists that the alleged contract, relied on by complainant, is utterly void and worthless, as regards the respondent, not only because made without authority, but because never recorded, and because respondent had no notice thereof when he purchased. Respondent also denies that D. B. Saunders, in his lifetime, ever sold any portion of the 2058-acre tract, and says the whole of it descended to his heirs, subject only to the lien of the Lead Mines Company. There are numerous other denials in respondent's answer of statements in appellant's bill, which need not be referred to here. Such is the claim asserted by the heirs of D. B. Saunders.

S. G. Saunders and wife, and E. T. Osborne and wife, also answered, jointly and severally, the said bill of Geo. W. Litter-

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all, and in resistance of this claim of Litterall, rely upon the facts and statements contained in the answer of Geo. Jackson: but, departing therefrom, allege that at the sale by Wm. Terry, commissioner, of the 2058-acre tract, which was purchased by Geo. Jackson, there was an express reservation or exception of the land in controversy; deny the validity of the contract under which Geo. W. Litterall claims, and insists that the land in controversy belongs to the heirs of D. B. Saunders, subject to the debts of the decedent. These parties then supplement their answer by a cross-bill in which, after a lengthy rehearsal of the facts hereinbefore set out, directly assail as null and void all the proceedings in said suit of Saunders v. Saunders, including the decree therein, under which the 2058-acre tract, including the land in controversy, was sold, on the ground that said county court had no jurisdiction to sell the land of *femes covert*, as in this case.

In the meantime the cause was removed to the circuit court of Wythe county, wherein a decree was pronounced on the 11th day of December, 1883, overruling the demurrer to the cross-bill of Geo. Jackson, and dismissing the bill of the complainant, Litterall, and the cross-bill of Saunders and others. From that decree the case is here on appeal.

In the first place, as touching the claim of the appellant to be entitled to specific execution of the contract relied on, the enquiry is, whether the contract is one, the specific performance of which can be enforced by a court of equity. If we look to the contract as a whole, so far from coming up to the requisites of definiteness and certainty in all its terms, it is obscure, and, in some important respects, senseless. It first sets forth with tolerable certainty a sale of that portion of the 2058-acre tract east of the "Low-Gap" road at the gross sum of \$100, the receipt of \$30 of which is acknowledged, and the remainder to be paid when the deed is made. Then comes a vague and, in fact, unintelligible intimation of the sale thereby of some additional quantity of land lying west of the "Low Gap,"—not the

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“Low-Gap road.” Whether this, whatever its quantity or locality, is adjoining to that part described as east of the “Low-Gap road,” or is a part of the 2058-acre survey, or part of the land in controversy, it is impossible to determine by looking to the terms of the contract, or by reference to anything shown satisfactorily by the record. If we confine our scrutiny to the first part of the contract which more definitely applies to that part east of the “Low-Gap road,” and treat it as the land in controversy, then we are confronted with the clear preponderance of testimony to the effect that the contract (such as it is) was obtained by the false and fraudulent misrepresentations of the vendee as to the quantity of land, of which the supposed vendor had no knowledge, and relied upon the statements of the vendee, who had information upon the subject, and represented the boundary to contain about 100, or at the utmost, 125 acres, when by actual survey it contained 458 acres, discovering which, the vendor refused to convey, and did not receive the balance of the purchase money, and that in fact, the contract was forfeited, and in effect, abandoned under a stipulation under-written, at the time on the same piece of paper, it appearing that said stipulation has been torn from the contract, and does not appear with the contract as exhibited with the complainant’s bill. In no view does the alleged contract, whether looked at by itself or in the light of surrounding circumstances, as disclosed by the testimony of witnesses, come up to the standard which is necessary to its capability of specific execution. See *Pigg v. Corder*, 12 Leigh, 69; *Graham v. Call*, 5 Munf. 396; *Wright v. Puckett*, 22 Gratt. 374.

But over and above all this, the supposed vendor had no interest in the subject at the time, nor any right to make the alleged sale. The contract, on its face, purports to be a sale by S. G. Saunders, administrator of D. B. Saunders; the language of the instrument being: “I have, as administrator of D. B. Saunders, deceased, this day bargained and sold to said Lewis Litterall, Jr., all that part of a tract of land belonging to said

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D. B. Saunders"; and he signs his name as "administrator of D. B. Saunders."

It cannot be necessary at this day to cite authorities for the proposition that an administrator cannot sell the land of his intestate. At the time of the contract the Lead Mines Company had not released their superior title to the heirs of D. B. Saunders, nor had S. G. Saunders completed the contract with said company agreed upon by it and D. B. Saunders in his lifetime, and whatever interest D. B. Saunders had therein had passed by descent to his heirs at law, who were married women. The well settled law is, that a court of equity has no power to decree either against a wife performance of her contract to convey her land, or against either the wife or the husband the performance of his or their contract to convey the wife's land. See *Watts v. Kenny*, 3 Leigh, 272; *Clark v. Raines*, 12 Gratt. 98. We are, therefore, of opinion, that the court did not err in overruling the demurrer to the appellee's cross-bill, and in dismissing the bill of the appellant.

2d. Did the court below err in dismissing the cross-bill of Saunders and others? We think not. It is insisted, however, that the county court was without jurisdiction, and that all the proceedings in the case of Saunders v. Saunders, wherein the land in controversy was decreed to be sold and was sold to pay the intestate's debts, and for the distribution of the residue among those entitled thereto; and this was acquiesced in by all parties concerned. It is true that mere consent cannot confer jurisdiction, where it does not exist; but in this and like cases the county court then had jurisdiction; in fact, the county court was a court of general and concurrent jurisdiction with the circuit court, except in respect to suits for the sale or partition of the lands of infants, or for the sale of the lands of insane persons, as to which the law gave exclusive jurisdiction to the circuit courts. See 1 R. C. p. 409, § 16; p. 417, ch. 109, § 22; Code 1873, ch. 124, §§ 2 and 3.

The law in force when the proceedings in Saunders v. Saun-

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ders were had, is found in § 16 of ch. 157, Code 1860; also, in 1. R. C. p. 249, ch. 71, § 7; and reads: "The court of a county or corporation shall have jurisdiction to hear and determine all cases at law or in chancery within such county or corporation which are now pending, or may hereafter be brought in said court," except certain cases therein enumerated, the suit in question not being among the cases excepted.

The suit in question was simply a suit to sell lands of a decedent, brought, not by an administrator, but by some of the heirs at law against the widow and other distributees, to pay the debts of the estate and for distribution, in which all parties in interest acquiesced. Clearly the county court had jurisdiction; and the court below did not therefore err in dismissing the cross-bill of Saunders and others. This statute was repealed by the subsequent act limiting the jurisdiction of county courts, but the repeal was subsequent to the proceedings in said suit had in the county court.

There is no error in the decree appealed from, and the same must be affirmed, with costs to the appellees.

DECREE AFFIRMED.

Wytheville.

ROANOKE CITY V. BERKOWITZ.

JUNE 27TH, 1885.

1. EMINENT DOMAIN—*Municipal corporations—Condemnation of land.*—Report of commissioners to condemn land for municipal purposes will not be quashed on the ground that a commissioner appointed, at the instance of the municipality, was interested, where the record does not show that the municipality was ignorant that he was interested when so appointed. Ignorance of the attorney making motion for the appointment, is not evidence of the municipality's ignorance that the commissioner was interested. But if commissioner was interested and disqualified, and municipality was ignorant, report will not be quashed, if record shows that the damages assessed are not excessive.
2. IDEM—*Interest in land condemned.*—Corporations condemning land under Code 1873, chapter 56, section 11, must take and pay for the fee-simple, and not merely an easement, except it be a turnpike company.
3. CONSTITUTION—*Condemnation of fee-simple.*—This statute requiring the condemnation of the fee-simple is not repugnant to the constitution. And if it was, the municipality cannot be heard to deny the validity of the statute under which it has chosen to proceed.
4. MUNICIPAL CORPORATIONS—*Damages—Ordinance.*—Ordinance to which land-owner refused assent, allowing him to build across the drain to be cut through land proposed to be condemned for the purpose, cannot be considered in assessing the damages.

Error to judgment of hustings court of city of Roanoke, rendered July 9th, 1884, in certain proceedings therein had for the condemnation of certain land for municipal purposes, wherein said city was plaintiff, and W. F. Berkowitz was defendant.

The record shows that during the summer of 1883, said city,

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then the town of Roanoke, by its council, undertook, for sanitary effects, to drain a portion of its area, and to straighten the course of a small stream. The town having become incorporated as the city of Roanoke, with a hustings court, at the June term, 1884, of said court, commissioners were appointed to condemn the land of said Berkowitz for said purpose, and to assess the damages. These commissioners made an alternative report: first, that if the city should be required to condemn the fee-simple of the land, then Berkowitz should have \$1000 damages; second, that if the city should be required to condemn only the use of the land, then he should have only \$200 damages. At the hearing on this report, the city moved to quash the same, on the ground that the damages awarded were excessive, and that C. Markley, one of the commissioners, was interested in the subject matter. The hustings court overruled the motion, and confirmed so much of the report as gave Berkowitz \$1000 damages. To this judgment the city of Roanoke obtained from one of the judges of this court a writ of error and *supersedeas*.

Penn & Cocke, for the plaintiff in error.

Waller R. Staples and *Thos. W. Miller*, for the defendant in error.

LEWIS, P., delivered the opinion of the court.

The first assignment of error, which relates to the refusal of the hustings court to quash the commissioners' report on the alleged ground that Markley, one of the commissioners, was interested, and therefore disqualified to act as such commissioner, is not well taken. In the first place, the record shows he was appointed at the instance of the city itself; and it does not appear that if in point of fact he was interested as alleged, the fact was not known to the city at the time of his appointment.

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And if known, then upon well settled principles, the objection now urged must be considered as having been waived.

The bill of exceptions, it is true, sets forth that "the acting attorney for the city, on whose suggestion the appointment was made, did not know at the time that either of the parties who were appointed commissioners had any interest in the matter, but that C. Markley has since informed him that he owns a lot of land through which the drain in question passes; that no damages have ever been paid him, and that his land has not been condemned." But this may be true, and yet it does not follow that the facts here relied on were not known to the city. For the corporation is represented by various officers and agents, all of whom except its "acting" attorney, for aught the record shows to the contrary, may have had knowledge of the facts of which it is said the latter was ignorant. Moreover, it does not appear that any proceedings are pending or contemplated for the condemnation of Markley's land, or that he is claiming compensation for the same, and *non constat* that he will.

But if it were conceded that he was disqualified, and that the facts from which such disqualification arose were not known to the city until after the report was returned, still the objection could not be sustained; for the evidence is entirely satisfactory to show that the sum reported is not excessive, and that the city has not been prejudiced. Indeed, it was admitted in the argument by the counsel for the city, that if the law be as contended for by the defendant in error as to the estate or interest to be condemned, the sum so reported is no more than a reasonable compensation for the land in question, including the damages sustained by the defendant in respect to the residue of his lots by reason of the construction of the proposed work.

And this brings us to the consideration of the next assignment of error, which is, that the hustings court erred in holding that in condemning the land, the fee, and not a mere easement, must be taken and paid for.

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The decision of this question must be governed by the terms of the statute under which the proceeding was conducted. The right of eminent domain, which is defined to be the right on the part of the state to take or control the use of private property for the public benefit when public necessity demands it, is inherent in every sovereignty, and is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, book I, ch. 20; Cooley's Const. Lim. 523; *Kohl v. United States*, 91 U. S. 367. The right, however, must be exercised upon such terms, and in such manner, and for such public uses as the legislature may direct. 2 Kent's Com. 340; 2 Min. Insts. 22, and cases cited. The whole subject, from its nature, belongs exclusively to the legislative department of the government, subject to the limitation imposed by the constitution in respect to just compensation for the property taken; and, hence, all questions affecting the rights of the parties in a case like this, must be determined not with reference to the decisions of the courts of other states, based on the peculiar statutes of those states, but according to the provisions of our own statutes. Those provisions, so far as they relate to the question now before us, are plain and unambiguous. They are as follows: "The sum so ascertained [by the commissioners] to be a just compensation, may be paid to the persons entitled thereto, or into court. Upon such payment, the title to that part of the land for which such compensation is allowed, shall be absolutely vested in the company, county or town in fee-simple, except in the case of a turnpike company, where a sufficient right of way only for the purpose of such company shall be vested." Code 1873, ch. 56, sec. 11. It is difficult to see how language could be plainer, or less liable to misconstruction. The requirement is imperative that *the fee* shall be vested, except in the single case of a turnpike company, where an easement only is acquired; and the exception proves the universality of the rule which was intended to be prescribed.

Counsel, however, refer to certain other statutory provisions,

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which, it is claimed, apply to the present case, and require a different determination of the question presented. Reference is made to the act of assembly, embodied in part in section 13, of chapter 120, of the Code of 1873, which enacts, as follows: "Any person desiring to drain his lands through the lands of others, may apply to the court of the county or corporation in which the whole or a part of the last mentioned lands may lie, for the appointment of commissioners to ascertain and report upon the propriety of granting said application, and the damages that may be sustained by the party or parties through whose lands the said drain is proposed to be run; of which application notice shall be given," etc. But it is obvious that this statute has no application to the case before us, and that it applies only to those cases in which the applicant is the owner of the land sought to be drained, which is not the present case. Here the object was not to drain land belonging to the city, but to construct a drain as a sanitary measure for the public benefit.

Moreover, as is manifest from the terms of the statute, it is left to the discretion of the court as to whether the application shall be entertained, and the proceedings set on foot which are authorized by the act. For by the following section (14) it is enacted that "if the court, on hearing the matter, *thinks it proper*, it shall issue its order appointing five commissioners, who shall * * * ascertain and report what damages, if any, may be sustained," etc.; whereas section 6 of chapter 56 of the Code, under which the present proceeding was instituted, enacts as follows: "If the president and directors of a company incorporated for a work of internal improvement, the court of a county, or the council of a town, cannot agree on the terms of purchase with those entitled to lands wanted for the purposes of the company, county or town, five disinterested *freeholders shall* be appointed by the court of the county or corporation in which such land, or the greater part thereof, shall lie (any three of whom may act), for the purpose of ascertaining a just compensation for such land." And then follow directions as to the

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steps to be taken to ascertain a just compensation for the land, that is, its fee-simple value, except that, as we have seen, a right of way only is acquired where the land is wanted for the purposes of a turnpike company.

Nor is the case affected by anything contained in section 31, of chapter 54, of the Code, which enacts that "in addition to the powers conferred by other general statutes, the council or board of trustees of any town shall have power to * * * prevent injury or annoyance from anything dangerous, offensive or unhealthy, and cause any nuisance to be abated."

Reference is also made to the charter of the town, which, among other things, provides as follows: "The council of the said town shall have all the general powers vested in it by the laws of this state, and, in addition thereto, shall have the following powers: First. To purchase, hold, sell and convey all real and personal property necessary for the purposes of the corporation," etc. And again: "Whenever any new street shall be laid out, graded or paved, a culvert built, or any other public improvement whatever made, the town council may determine what portion, if any, of the expense thereof should be paid from corporation funds, and what portion by the owners of real estate benefited thereby." Acts 1881-82, p. 52, *et seq.* But it is equally plain that these provisions of the charter have no bearing on the present case. They simply give authority to the town to purchase and hold property for the purposes of the corporation, and to make, and to provide for defraying the expense of, all public improvements. They authorize the town to purchase property, but not to condemn it. If, therefore, it cannot acquire such real estate as is wanted for its purposes by contract with the owner or owners thereof, then, under the general statute relating to the condemnation of private property, it may resort to the proper court and acquire it in the mode prescribed by the act. And that is precisely what it has done in the present case.

It may be, and doubtless the fact is, that the use of the land

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in question would be ample for the purposes which the city had in view ; and undoubtedly the legislature might have provided in such cases for the condemnation of the use only, but it has not seen fit to do so. On the contrary, it has enacted, in terms too plain to be misunderstood, that the fee shall be taken ; and by this requirement of the statute the courts must be governed in all cases arising under it. *Pitzer v. Williams*, 2 Rob. 241.

Nor is the objection well founded that the statute, as we have interpreted it, is repugnant to the constitution. If by virtue of the right of eminent domain, which, according to Vattel, is the right of disposing, in case of necessity and for the public safety, of all the wealth contained in the state, it is competent for the legislature to authorize the condemnation of private property at all, it is difficult to see why it may not require the fee to be taken as well as the use merely. The constitution imposes no other limitation on the power of the legislature in this particular than that contained in the clause which forbids the taking of private property for public use without just compensation ; and the authorities all agree that under a general statute, like the one in question, no more can be rightfully taken, without the owner's consent, than the necessity of the case requires. Thus, where a part only of a man's land is needed for a court-house or other public purpose, the necessity for the appropriation of that part will not justify the taking of the whole against his will, even though compensation be made therefor. For the right of eminent domain being based on necessity, cannot be broader than the necessity which supports it. But the case is widely different where a corporation, other than a turnpike company, seeks to have lands condemned and to acquire the use only, when the owner demands that the fee be taken. Manifestly it has no right to claim a conjoint occupation of the property, for it might often happen that such appropriation would virtually deprive the owner of the beneficial enjoyment of his property altogether. And it was doubtless for this reason that the legislature was careful to require the fee to be

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taken and paid for where land is condemned for the purposes of a city or town.

"As a general rule," says an eminent writer, "the laws for the exercise of the right of eminent domain do not assume to go further than to appropriate the use, and the title in fee still remains in the original owner. It seems, however, to be competent for the state to appropriate the title to the land in fee, and so to altogether exclude any use by the former owner, except that which every individual citizen is entitled to make, if, in the opinion of the legislature, it is needful that the fee be taken." Cooley's Const. Lim. 558.

The view thus expressed is fully supported by the adjudged cases, which hold that the question as to the degree or quantity of interest to be taken is, like other political questions, exclusively for the legislature; and that when the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. *De Varaigne v. Fox*, 2 Blatchf. 95; *People v. Smith*, 21 N. Y. 595; *Boom Company v. Patterson*, 98 U. S. 403; *United States v. Jones*, 109 Id. 513; *Beekman v. S. S. R. R. Co.*, 3 Paige, 45; S. C., 22 Am. Dec. 679, and cases cited in the note, p. 692.

But it is unnecessary to dwell upon this point. Clearly, the city cannot be heard to deny the validity of the statute under which it has chosen to proceed. If the statute is invalid then no title whatever can be acquired by virtue of the present proceeding to the land in question. If it is valid, then the interest to be acquired, and for which judgment must be made, is nothing less than the fee-simple. This the statute requires; and the question of expense to the city in making the proposed improvement, except so far as the matter of just compensation to the owner of the land sought to be acquired is concerned, is not a question to be considered by the court. *Ita lex scripta est* is a sufficient answer to all that has been urged in the argument by counsel for the city.

Nor did the hustings court err in holding, that in ascertain-

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ing the sum to be paid for the land in question, the ordinance of the town council, of the 10th October, 1883, could not be considered. That ordinance is as follows:

“Whereas the town of Roanoke has called for a commission for the purpose of assessing the damages to the lot of W. F. Berkowitz, by reason of running a water-course through his property. And whereas the council has no intention of restraining Mr. Berkowitz from the privilege of erecting any house or other structure across the said stream, and Mr. Berkowitz is desirous that such may be made distinctly; therefore, be it resolved,

“1st. That the privilege is hereby granted Mr. W. F. Berkowitz to erect such building or structure across the said stream as he may desire, provided that he does not obstruct the free passage of water underneath the same. * * * *

“2d. That the mayor is hereby authorized to convey by deed the said privilege to the said Berkowitz, should he desire the same.”

This ordinance is assailed by the defendant in error as *ultra vires*, and consequently revocable at the will of the council. And in support of this position reference is made to the case of *Norfolk City v. Chamberlaine*, 29 Gratt. 534. Without, however, deciding the question thus raised, it is sufficient to say that it does not appear that the ordinance was passed at the instance of Berkowitz, or that he has at any time acquiesced therein. On the contrary, the record shows that “his assent thereto was distinctly denied.” Clearly, then, his rights are unaffected thereby, and the hustings court properly so held.

Upon the whole, we are of opinion that there is no error in the judgment, and that it must be affirmed.

JUDGMENT AFFIRMED.

Wytheville.

STUART & PALMER v. PRESTON & ALS.

JUNE 18TH, 1885.

APPELLATE COURT—*First appeal—Second appeal.*—It is the well settled rule of this court, that a question which has been decided upon the first appeal in any cause, cannot be reviewed or reversed upon any subsequent appeal in the same cause. *Ins. Co v. Clemmitt*, 77 Va. 366.

Appeal from decree of circuit court of Washington county, rendered June 17th, 1884, in the suit in chancery wherein Wm. A. Stuart and Geo. W. Palmer are plaintiffs, and Thomas L. Preston and others are defendants.

Opinion states the case.

Jno. A. Campbell, for the appellants.

D. S. Pierce and *White & Buchanan*, for the appellees.

HINTON, J., delivered the opinion of the court.

This is, in effect, an effort to have a matter which has been formally adjudged, in a previous decree of the court of appeals, reversed, upon a second decree in the same cause. The case arises upon an exception to an item. \$1706.83, which the commissioner, in strict pursuance of the express mandate of the appellate court, in its decree of July 30, 1881, has debited against the appellants, in stating the accounts between the par-

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ties. Even if it were clear, and it is not, that this item of \$1706.83 was mistakenly directed in the former appeal to this court, to be charged against the appellants, yet they can have no relief in this proceeding, for it is a settled rule of this court, that a question which has been decided upon the first appeal in any cause, cannot be reviewed or reversed upon any subsequent appeal in the same cause. See *The Bank of Virginia v. Craig*, 6 Leigh, 399; *Griffin v. Cunningham*, 20 Gratt. 31; *Campbell's ex'ors v. Campbell's ex'ors*, 22 Gratt. 671; *N. Y. Life Insurance Co. v. Clemmitt*, 77 Va. 366. The rule is founded upon the absolute and obvious necessity for the termination of controversies as well as upon the finality of the decisions of the appellate court. Now, a more palpable instance of an effort to infract this rule could scarcely be conceived than the one presented by the record in this case, because unless error can be predicated of the action of a lower court and its commissioner in doing precisely what it was required by the court of appeals to do, the circuit court has committed no error. Therefore, and for all practical purposes, the present appeal must be regarded as an attempt to reverse the former decree of this court upon a subsequent appeal in the same case. The inadmissibility of this attempt is made more glaring, if we contemplate for a moment the method suggested by the appellants for a correction of the supposed error, which is that this court should further violate its rule by making the \$1706.83 a credit upon a note for \$17,434, the whole of which, by the express terms of the same decree of this court, is directed to be debited against the appellants also.

It is needless to pursue the subject further; the appellants having omitted to petition for a rehearing at the proper time, cannot now have this supposed error corrected by appeal. It follows that the decree of the circuit court of Washington county, which is complained of, is right and must be affirmed.

DECREE AFFIRMED.

Syllabus.

Wytheville.

WATTS & ALS. v. TAYLOR'S ADM'R & ALS.

JUNE 25TH, 1885.

RICHARDSON, J., absent.

1. **PERSONAL REPRESENTATIVES—Heirs, &c.**—Judgment against the first in suit to which the last were not parties, affects not the last for want of privity; and is not evidence against them in suit to subject the decedent's real estate; and Code 1873, ch. 127, § 3, does not alter the rule. *Brewis v. Lawson*, 76 Va. 36.
2. **IDEM—Judgment creditor.**—Yet, suit against personal representatives jointly with heirs, &c., by creditor of decedent, to collect out of real estate or otherwise, bond debt whereon judgment existed against personal representatives, is maintainable by evidence other than said judgment, though said judgment be set forth in the bill, the heirs, &c., having as full opportunity to defend against the debt as though no judgment existed.
3. **IDEM—Case at bar.**—Intestate left lands, slaves and other personalty; also widow and adult children, who divided among themselves the lands and chattels, leaving administrator only certain choses in action wherewith to pay debts. Account of administration, as nearly accurate as lapse of time and meagre evidence allowed, showed him in advance to estate with nothing wherewith to pay judgment obtained against him by decedent's creditor, who sued, in chancery, administrator and his sureties, and the widow, heirs and distributees, to collect out of decedent's unaliened lands, or otherwise, the bond debt represented by said judgment.

HELD:—

1. The suit may be maintained against the heirs, &c., to collect the debt out of the unaliened lands, upon evidence *other than* the judgment.
2. Equity will allow resort at once to said lands, instead of going upon the sureties of the administrator.

Statement—Opinion.

Appeal from two decrees of circuit court of Tazewell county, rendered November 15th, 1879, and May 19th, 1882, respectively, in the cause wherein James W. Smith, sheriff of said county, and as such administrator *d. b. n. c. t. a.* of John W. Taylor, deceased, was plaintiff, and Jane M. Watts, wife of Sterling F. Watts, George P. George and Rhoda I. George, in their own right and as personal representatives of John B. George, deceased, and others, were defendants.

The object of the suit was to subject the lands of said decedent in the hands of his heirs, among whom the lands and personalty had been mainly divided, to pay a debt due by bond executed by said John B. George to said John W. Taylor, whereon judgment had been rendered at November term, 1873, against the former's personal representative, who had nothing wherewith to pay it, and to whom the estate was indebted. Circuit court held that the plaintiff was entitled to subject the said lands at once to the payment of the debt without going upon the sureties of the personal representative of John B. George; and from this decree Mrs. Jane M. Watts, by her next friend, &c., and her trustee, R. C. Fudge, appealed to this court.

Opinion states the facts.

Joseph W. Caldwell, Samuel W. Williams, and F. S. Blair, for the appellants.

A. J. & S. D. May, J. H. Gilmore and W. R. Staples, for the appellees.

HINTON, J., delivered the opinion of the court.

This was a suit in equity, brought by James W. Smith, sheriff of Tazewell county, and as such administrator *de bonis non*, with the will annexed, of John W. Taylor, deceased, against the administrator and administratrix of John B. George, deceased, as

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such, and their surviving sureties, and the personal representatives of those sureties who had died, and the distributees of the said John B. George, two of whom were his administrator and administratrix. The object of said suit was to recover from the estate of the said John B. George the amount of a judgment recovered in the circuit court of Tazewell county, on the — day of November, 1873, by the executors of said Taylor against George P. George and Rhoda I. George, administrator and administratrix of the said John B. George, for the sum of \$1040, with interest thereon from the 4th June, 1851, and costs, subject to certain credits, which do not reduce the balance due on said judgment below the sum of \$500. The bill prays for a settlement of the accounts of said administrator and administratrix, and a payment of said balance out of any sum that might be found against them, and failing in this, then out of the real estate of the appellant, Jane M. Watts. The administrator, George B. George, in his answer, relies on the statute of limitations and the staleness of the claim as bars to the suit. He admits that no settlement of his accounts as administrator had been made; denies that he alone acted as administrator; or that he is in arrear to the estate; or that he has misapplied any of the assets of said estate. He shows that the lands and slaves belonging to the estate were partitioned between his mother, sister and himself, in pursuance of an agreement which he files with his answer; and asserts that all and every other portion of the personal estate, except debts or choses in action were, in a few months after the death of John B. George, divided and distributed between the widow and children, in pursuance of an agreement between them that the persons appointed by court to appraise the estate should do so, and that the widow and children (who consisted only of himself and sister), should take their portion at the price fixed by the appraisers. It appears that the debts due the estate and three slaves, estimated by the commissioner as worth \$1200, went into the hands of the administrator, but his mother and sister allowed him, by the agree-

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ment under which the land and slaves were divided, the sum of \$3000, in payment of services rendered his father during life.

At the May term, 1876, the bill and amended bill were taken for confessed, and the cause was referred to a commissioner to take and settle the administration account of the administrator and administratrix, but no account of debts was directed. At the November term, 1879, a decree was rendered rejecting from the account as taken all of the personal property of which the intestate was possessed at the time of his death, "except the three negroes and the money, and the choses in action," above mentioned. And this is the first decree of which the appellants complain.

In July, 1877, the appellants Sterling F. Watts and Jane M., his wife, filed their cross-bill in this cause. The complainants, after setting out in this cross-bill all of the proceedings upon the original and amended bill, &c., go on to say, that a large amount of personal property, consisting of stock on the farms, bank stocks and debts due the intestate, went into the hands of the administrator; that John B. George at his death was, as they are advised, very little indebted—so little as to be quite inconsiderable compared to the large amount which went into the hands of the administrator and administratrix. They say that they believe that the whole fund passed into the hands of George P. George, and that he was alone active in administering the estate, and they submit to the court all questions respecting the liabilities of the administrator and administratrix, and their sureties. They ask that the account which had been ordered in the original suit may be taken and completed, and that the amount found due by and chargeable upon the personal representatives of John B. George, after paying anything found due the estate, may be decreed and distributed among the heirs and distributees of the said John B. George. The cross-bill was demurred to and answered by George P. George, the administrator, and his sureties. In their answer they deny that the complainants in the cross-bill have any right to hold

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them to any responsibility arising from or connected with the estate of John B. George, for the reasons set out in the answer of George P. George to the amended bill. They aver that the appraisal, made out by Sterling F. Watts himself, is erroneous in many respects; was never adopted, and is therefore worthless as evidence of the personal estate left by the intestate. The answer then concludes with the averment that the complainants "cannot complain of the appropriation of their realty to the demands of their unsatisfied creditors, for the reason, that it has been caused by their own act in receiving and enjoying the personalty, to the exclusion of the creditors, if any, whose debts remain unpaid."

At the May term, 1882, these causes came on to be heard, when the court confirmed the report of the commissioner, which showed that the administrator was in advance to the estate in the sum of \$997.04, and that there was nothing in the hands of either the administrator or administratrix out of which to pay the judgment, and decreed that the sureties of the personal representatives of John B. George were exonerated from liability to any of his distributees for the personal property distributed among themselves, and that unless the distributees should within thirty days pay the costs of the plaintiff in the original bill, together with the judgment of the complainant set out in the bill, that the land of Rhoda I. George and S. F. Watts in the bill mentioned should be rented out for the shortest term that would pay and discharge the judgment set out, and costs and commissions, and costs of renting. And this is the second decree of which the appellant complains.

Now the first objection which is urged against these decrees is, that this judgment, although good and sufficient evidence of a debt against the personal representatives and their sureties, is no evidence against these appellants, and therefore that the court had no right to decree against them for it. It must be conceded that usually one of the first steps taken in a suit in equity, brought to administer assets, is to decree an account,

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not only of the personal assets and of their application, but also of the debt of the plaintiff if the suit is brought for the plaintiff alone, and of all the debts, if the suit is brought on behalf of all creditors. In this case, no such account was taken or asked for. The suit would seem, upon a cursory reading, to be brought entirely on the judgment, but upon a closer inspection, we think it may be discerned in the bill and proceedings, that whilst the draftsman, under the mistaken impression that the judgment constituted a charge on all the real estate of the intestate which had not been aliened, has given it undue prominence, yet, that the real object for which the suit was brought *was the recovery of the debt*. That such was the purpose, is established by the fact, that in both the original and amended bills, it is distinctly stated, that the judgment was recovered upon a bond which was duly executed by John B. George in his lifetime, to John W. Taylor. And that the suit was regarded and treated as a proceeding to collect this bond debt, is obvious from the fact that no objection was made in the court below by the appellants to the use of this judgment as evidence against them, as well as from the fact that they not only did not attempt to deny its existence, but sought to show that it was payable by the administrator and his sureties. Manifestly the existence of both the bond and the debt was a matter of such general notoriety, that it was regarded as a work of supererogation to call for proof of it. In *Brewis v. Lawson*, 76 Va. 40, Judge Burks, after stating the general rule that "a judgment by default against a personal representative in a suit to which the heirs or devisees of the decedent are not parties, is not evidence against such heirs or devisees, in a suit or proceeding by the creditor to subject the real estate, descended or devised, to the payment of the debt," for the reason, that there is no privity between the representative and such heirs or devisees, said: "If the judgment of Anthony Lawson was the only evidence of his debt in this record, under the authority of cases adjudged by our predecessors, he could have no decree against

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the lands devised to Thomas A. Brewis, which on his death descended to his heirs. But the bond on which the judgment was founded was brought into the cause by the heirs themselves. While they disputed the judgment, they did not question the validity of the bond, but on other grounds denied the liability of their inheritance for its payment. The bill, it is true, does not in terms refer to the bond, but to the judgment, as evidence of the debt. The heirs in their answer do not confine their defence to the judgment, but extend it to the debt, of which the judgment is but the evidence; and it is evident from the record that every defence was made that would have been made if the bill had been framed on the bond instead of the judgment. It would certainly have been more in accordance with the rules of good pleading, if the complainant in his bill had based his claim as against the heirs directly on the bond: but when the court sees, from the record, that the litigation was extended by the heirs themselves, without objection from the complainant, beyond the judgment to the debt itself, and that full defence was allowed and made, in like manner as if there had been no judgment, looking to substance rather than form, as courts of equity are accustomed to do, it will treat the case as if the bond instead of the judgment had been set out as the evidence of the debt. There was no necessity for the complainant to prove the execution of the bond, for it was virtually admitted by the answer."

These observations of the learned judge are pregnant with suggestions applicable to this case. Here the existence and condition of the bond is fully set out in both the original and amended bill, and its execution by the intestate, John B. George, is fully alleged. Every opportunity was thus afforded the parties to the suit to call for its production and question its validity. Had there been the slightest doubt as to its genuineness, or the credits to which it was subject, beyond a doubt it would have been called for, and a suitable defence would have been made. Under these circumstances, the failure of the heirs, administra-

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tors and their sureties, to contest either the bond or judgment, cannot but be construed into an admission of the debt, and neither the heirs nor the sureties will be allowed to allege the non-existence of the debt for the first time in this court, nor to shield themselves behind a rule applicable to cases in which the parties defendant to the controversy have had no opportunity to contest the validity of the demand sought to be set up against them.

This brings me to consider the only remaining question in the case, that is, whether a decree should go against the distributees or the sureties of the personal representatives.

The depositions of S. Sisson and Rhoda I. George satisfy me that these distributees not only partitioned the slaves and lands equally among themselves, but that they parcelled out all of the personalty among themselves as well. I am also convinced that the account which has been taken is as nearly accurate as any account can be when taken at such a distance of time from the period of the occurrence of the transactions, and when there appears to be not the least likelihood of obtaining other evidence in addition to the meagre and unsatisfactory testimony afforded by this record. This account shows not only that this administrator has administered the choses in action that he retained, and the proceeds of the sale of the three negroes, but that he is in advance to the estate. It is therefore apparent, that if this debt is to be paid, the loss must fall either upon the sureties or upon the distributees, the said Rhoda I. George and Jane M. Watts—and the question therefore is, upon which of these shall it fall. Shall it be upon the sureties who had no agency in making away with the assets of this estate, or upon these distributees, two of whom were the personal representatives, and all of whom have intermeddled with and interrupted the usual and regular administration of this estate, and have appropriated it to their own private uses? Upon this point I think there can be neither doubt nor difficulty. The engagement of the sureties was, that they would be responsible for the

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due administration of this estate; that is, that the personal representatives should faithfully collect the assets, pay off the debts of the estate, and turn over the rest of the personalty to the distributees; but this presupposed and assumed that any dereliction of duty which might occur in the course of the administration of the assets should not be brought about or abetted by the distributees, for no man can be allowed to take advantage of his own wrong. Had they stood aloof and awaited the regular, orderly disposition of these assets, they would have been entitled not only to all that remained after the payment of the debts, but to call upon these sureties to make good to them any loss they might sustain by reason of a misapplication of the assets by the administrator. By participating with the administrator in making distribution of the personalty among themselves they aided the administrator in the commission of a *devastavit*, and thereby exonerated the sureties from any liability to them for any assets which they, the distributees themselves, had appropriated. In such a case, equity allows the injured party to go directly against all of the wrongdoers, who are in this case the distributees. Schouler's Ex'ors & Adm'rs, §§ 332, 394; *Lewis v. Overby's adm'r*, 31 Gratt. 601; *Ryan's adm'r v. McLeod & als.*, 32 Gratt. 367.

For these reasons I am of opinion to affirm the decrees of the circuit court of Tazewell county, which are appealed from.

DECREES AFFIRMED.

Richmond.

GREENHOW & ALS v. JAMES' EX'OR.

APRIL 16TH, 1885.

1. MARRIAGE—*Lex loci*—*Lex domicilii*.—The law of the place of its celebration governs as to the forms of ceremony which constitute marriage. The law of the domicile governs as to the capacity of the parties. But the rule which requires that "a marriage valid where celebrated, is valid everywhere else," has no application to a marriage entered into in a foreign country, in contravention of the public policy and statutes of the country of the domicile of the parties which pronounce marriage between them not only absolutely void, but *criminal*.
2. CONSTRUCTION OF STATUTES—*Bastards*—*Legitimation*.—Code 1873, ch. 119, §§ 6 and 7, providing that "if a man having had offspring by a woman shall afterwards intermarry with her, such offspring, if recognized by him before or after the marriage, shall be deemed legitimate," and that "the issue of marriages deemed null in law, or dissolved by a court, shall, nevertheless, be legitimate," does not apply to and legitimate the offspring of a cohabitation in this state between a white person and a negro, when the parents subsequently have celebrated between them a ceremony of marriage, outside of this state, in some place where marriage between such persons is lawful.

Appeal from decree of circuit court of Fredericksburg, rendered at its June term, 1883, in the chancery cause of Greenhow and als *against* W. P. Conway, executor of Mary James, deceased.

The object of this suit was to recover of said executor a legacy given by the will of the testatrix, "to the children of Dade Hooe," the plaintiffs claiming to be those children. The question was, whether or not they were the legitimate children of

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Dade Hooe. The decree was against them, and they appealed to this court.

Opinion states the case.

Little & Little, for appellants.

E. E. Meredith, for appellees.

HINTON, J., delivered the opinion of the court.

Sometime in the year 1830, or 1831, one Mary James, of the county of Stafford, departed this life, having first made her will, which was duly probated and recorded. This will, along with the records of the county, was destroyed during the late war; but that portion of it which bears upon this case has been set up and established to the thorough satisfaction of all parties to this litigation, by the deposition of W. P. Conway, the surviving executor. By this portion of the will, the said testatrix, Mary James, devised and bequeathed all of the residue of her estate, after the payment of her debts and sundry specific legacies, to the said W. P. Conway and R. C. L. Moncure, her executors, in trust, for the use of her brother, Wm. S. James, during his life, then for the use of her sister, Nancy Hooe, during her life, and after her death, for the use of Dade Hooe and George Hooe, sons of the said Nancy, for their joint lives, and if either should die without children, the whole for the use of the survivor for life, and at his death to *the children of the survivor in fee*.

The brother and sister of the testatrix departed this life many years ago, and soon after their death George Hooe also died unmarried and without issue, leaving Dade Hooe alone surviving, in whom the use of the whole residuum was vested for life, with remainder in fee to his children. Soon after the death of the testatrix, the said Dade Hooe commenced to live and cohabit with one Hannah Greenhow, a woman of color. These parties

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continued to live together for upwards of forty years and until the death of Dade Hooe, in 1881. The fruit of this illicit intercourse was eleven children, the plaintiffs in this suit. In November, 1875, Dade Hooe and Hannah Greenhow, who were then, and afterwards remained domiciled in this state, went to Washington for the purpose, and there went through the ceremony of marriage in accordance with the forms prescribed by the laws of the District of Columbia.

The plaintiffs, who are also the appellants, were always recognized by Dade Hooe as his children, and there seems to be no doubt but that the ceremony of marriage was celebrated by their parents in the District of Columbia for the purpose of legitimatizing these children. This suit was instituted by these plaintiffs for the purpose of recovering of the executors certain bonds to which they claim to be entitled under the will of the said Mary James, as being the legitimate children of the said Dade Hooe.

Now it is argued for the appellants, that they are legitimate, first, because, although born out of wedlock, they must yet be considered as the issue of a marriage deemed null in law, who by the express words of the statute, Code 1873, chap. 119, § 7, are "nevertheless * legitimate"; and second, because under section 6 of the same chapter the subsequent intermarriage of the parents and recognition of the father, legitimated them.

It is clear, however, that if the words "issue of a marriage" used in the seventh section are to be taken, as we think they should, in their ordinary acceptation, that the plaintiffs cannot be regarded, either in fact or in contemplation of law, as the issue of the marriage, for the simple reason that their births antedated the marriage. This suggestion, therefore, might well be laid out of view. But assuming for the nonce that the true construction of this sentence is that contended for by the appellants, namely, that "under the case of *Coults v. Greenhow*, 2 Munf. 372, prior born children are as much the issue of the marriage as those born afterwards," the question then arises,

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whether the offspring of an illicit intercourse between a white person and a negro, both domiciled in Virginia, can be legitimated by a marriage subsequently solemnized in a state or district where the laws permit such marriages. And this question must, we think, at this day be both upon principle and authority, answered in the negative.

In *Brook v. Brook*, 9 H. L. Cas. 223, Lord Cranworth said: "The conclusion at which I have arrived is the same as that which my noble and learned friend on the woolsack has come to, namely, that though in the case of marriages celebrated abroad the *lex loci contractus* must *quoad solemnitates* determine the validity of the contract, yet no law but our own can decide whether the contract is or is not one which the parties to it, being subjects of her majesty, domiciled in this country, might lawfully make."

"There can be no doubt as to the power of every country," says he, "to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. And if the marriages of all its subjects were contracted within its own boundaries no such difficulties as that which has arisen in the present case could exist. But that is not the case; the intercourse of the people of all Christian countries among one another is so constant, and the number of subjects of one country, living in or passing through another is so great, that the marriage of the subject of one country within territories of another must be a matter of frequent occurrence. So, again, if the laws of all countries were the same as to who might marry, and what should constitute marriage, there would be no difficulty; but that is not the case, hence it becomes necessary for every country to determine by what rule it will be guided in deciding on the validity of a marriage entered into beyond the area over which the authority of its own laws extends."

"The rule," says he, "in this country, and I believe generally in all countries is, that the marriage, if good in the country

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where it was contracted, is good everywhere, subject, however, to some qualifications, one of them being that the marriage is not a marriage prohibited by the laws of the country to which the parties contracting marriage belong."

And in this same case, the lord-chancellor (Lord Campbell) after stating the general rule, that a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere, adds: "But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But, if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated." And again he says, at page 219: "If a marriage absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which the marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist upon their marriage being recognized as lawful."

In *Sottomayer v. DeBurros*, L. R. 3 Prob. Div. 5, Cotton, L. J., said: "But it is a well-recognized principle of law that the question of personal capacity to enter into a contract is to be decided by the law of the domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is sol-

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emnized is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but as in other contracts, so in that of marriage, personal capacity must depend on the law of the domicile." See also to the same effect Dicey on Domicile, p. 202; *Williams v. Oates*, 5 Ired. 535; *Dupre v. Ex'or of Boulard*, 10 La. Ann. 411, and *State v. Bell*, 7 Baxter, 9; *Kinney v. Com.*, 30 Gratt. 858; *State v. Kennedy*, 76 N. C. 251. I have quoted thus largely from the authorities to show that the capacity to enter into the marriage contract, being one of the essentials of the contract, must be governed by the law of the domicile, and that whether the rule which requires that a marriage valid where celebrated is valid everywhere else arises out of all the comity between nations or *ex debito justitiæ*, yet that it can have no application to a marriage contract entered into in a foreign country in contravention of the public policy and statutes of the country of their domicile which pronounces a marriage between them not only "absolutely void," but criminal. In the very nature of things every sovereign state must have the power to prescribe what incapacities for contracting marriage shall be established as the law of the state among her own citizens, and it follows, therefore, that when the state has once pronounced an incapacity on the part of any of its citizens to enter into the marriage relation with each other, that such incapacity attaches itself to the person of the parties, and although it may not be enforceable during the absence of the parties, it at once revives with all its prohibitive power upon their return to the place of domicile. Fully impressed with the soundness of these views, we will only add that, in our opinion, sections 6 and 7 of chapter 119 of the code, do not contemplate a marriage made absolutely void by the express terms of the statute, and that an examination of the cases in this state, referred to

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in the brief of the appellants, will disclose nothing in conflict with the views herein expressed.

The decree of the circuit court of Fredericksburg is plainly right and must be affirmed.

LACY, J., and FAUNTLEROY, J., concurred in the opinion of HINTON, J.

LEWIS, P., dissented.

RICHARDSON, J., dissenting, said:

I do not concur in the opinion just delivered. There is no dispute as to the facts of this case. The sole question for consideration and determination is, whether the offspring of a cohabitation between a white person and a negro can, in Virginia, become legitimated, where the parties thus cohabiting, after the birth of the children, the offspring of such cohabitation, are married outside of Virginia, where such marriage is lawful.

The facts are these: Sometime about the year 1831, Mary James departed this life seized and possessed of considerable estate in the county of Stafford, where she died, leaving a will, by which she disposed of her property, and by which the late Judge R. C. L. Moncure and W. Peyton Conway were appointed her executors; which will was duly probated in said county of Stafford. The said will, with the records of said county, was destroyed by fire during the late war; but its contents, so far as necessary, have been established, and in that respect there is no dispute here.

By her will, after providing for the payment of her debts and sundry special legacies, Mary James devised and bequeathed all the residue of her estate to said R. C. L. Moncure and W. P. Conway, her executors, *in trust*, for the use of her brother, Wm. S. James, during his life, then for the use of her

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sister, Nancy Hooe, during her life, and after her death, for the use of the said Nancy Hooe's two sons, to wit: Dade Hooe and George Hooe, during their joint lives, and if either should die without children, the whole for the survivor for life, and at his death to the *children of the survivor in fee*.

The first two life-tenants died many years ago, and soon thereafter the said George Hooe also died, unmarried and without issue, leaving Dade Hooe alone, in whom the use of the entire residuum became vested for life, with remainder in fee to his children.

Subsequent to the death of his aunt, the said testatrix, Dade Hooe commenced, and for many years continued, to cohabit, in Virginia, with one Hannah Greenhow, a woman of color, by whom he had eleven children, who are the appellants here, all of whom were always recognized by said Dade Hooe as his children, the relation and cohabitation between him and said Hannah Greenhow having lasted for some forty years, and was only terminated by his death in 1881.

In the year 1875, Dade Hooe and Hannah Greenhow were lawfully married in the city of Washington, in accordance with the laws of the District of Columbia, and afterwards returned to Stafford county, where they continued to live together until separated by death; the offspring of such cohabitation, the appellants here, having been all the time, both prior and subsequent to said marriage, recognized by Dade Hooe as his children.

The executors of Mary James faithfully executed the trusts committed to them. By the last report of said executors, it appears that there was a residuum of the estate which went into their hands, of one thousand dollars, which they had invested in Virginia state securities, which they held as trustees under the will of Mary James, for the use of Dade Hooe, the surviving life-tenant, to whom the interest on said investment had been regularly paid. Since the death of Judge Moncure, said securities have been held by the surviving executor, W. P.

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Conway; and the appellants, claiming to be entitled to same, as the children of Dade Hooe, according to the terms of the devise by Mary James, made demand upon said surviving executor therefor; but he, being in doubt as to whether they were entitled thereto, refused to deliver said securities to them without first having the question judicially settled.

Accordingly, in February, 1883, the appellants filed their bill in the circuit court at Fredericksburg, setting forth substantially the facts aforesaid, claiming that under the laws of Virginia, they are the legitimate children of Dade Hooe, and as such entitled to said residuum, and praying that said surviving executor be required to deliver said securities to them, and for general relief. To this bill the said surviving executor, Conway, and the heirs at law of Mary James, the testatrix, were made parties defendant.

Conway, the executor, answered the bill, and, while in other respects he admitted its statements as to the claim of the complainants to the property in question, he simply submitted himself to the direction of the court. None of the heirs at law of Mary James answered the bill, nor have they in any way appeared or asserted any claim to the property in suit. It should also be stated, that Dade Hooe left a will, by which he devised all the estate, as follows: "I give my property, of every kind whatsoever, real or personal, in possession or in action, remainder or reversion, to which I am now entitled or may be entitled at the time of my death, or at any time afterwards, to the children of Hannah Greenhow, a woman of color, who is now and for many years has been living with me, the said children being eleven (11) in number, and being my natural children, or to such of the said children as may be living at my death, and the issue then living of such as may be then dead, such issue taking *per stirpes*." This will was duly executed and witnessed by Judge R. C. L. Moncure and John M. Hull, and was duly proved by the subscribing witnesses, and admitted to record in Stafford county court, on the 20th day of July, 1881.

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At the hearing of the cause, in June, 1883, the circuit court entered a decree holding that the plaintiffs, the appellants here, were not entitled to said fund; in other words, that these appellants cannot be considered, under the law of Virginia, the legitimate children of Dade Hooe. From that decree the case is here on appeal.

The precise question presented by the record in this case has never been decided by this court; that is, no case has been decided touching the legitimacy of the offspring of a cohabitation of a white person with a negro, when the parties thus cohabiting afterwards marry. We shall presently see that, upon principle, the question was long ago settled by this court, and in favor of the right asserted by the appellants in this case. In printed arguments on both sides, and in an oral argument on behalf of the appellants, the case has been ably presented. We were not favored with an oral argument on behalf of the appellees. A large number of authorities, both English and American, have been referred to, all of which, together with such others as were available, have been carefully examined. To examine and comment upon the numerous authorities to which we have been referred, would exhibit a curious and perplexing diversity of judicial determination, but could serve no really useful purpose here, as this case is, in my opinion, necessarily governed by our own statute.

By the 6th section of ch. 119, Code 1873, it is provided: "If a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendants, if recognized by him before or after the marriage, shall be deemed legitimate." And by the 7th section of same chapter, it is declared that: "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate." These humane provisions of our law stand in striking contrast to the barbarous common law principle by which all are and must remain bastards who are born out of lawful wedlock. Discussing this English doctrine, which has been utterly

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discarded in Virginia, Carr, J., in *Davis v. Rowe*, 6 Rand. 355, said: "The framers of our law looked to these provisions of the English law to avoid, not to imitate, to pull down, not to build up; its principles are violated; its landmarks removed; its fences broken down; its traces obliterated."

There are, in Virginia, two chief grounds which render marriage absolutely void: These are, (1) marriage between a white person and a negro; and (2) marriage where there is an existing prior marriage, which constitutes the crime of bigamy. In the first case named, that of marriage between a white person and a negro, which by the law of Virginia is punished as a felony by confinement in the penitentiary for a period of not less than *two* nor more than *five years*; yet for the crime of bigamy the period of confinement in the penitentiary is fixed at not less than *three* nor more than *eight* years. See Acts 1877-8, p. 301-2. This is singular legislative leniency in favor of intermarriage between white persons and negroes, especially in view of the abhorrence in which the amalgamation of the two races is held. Doubtless the legislature was guided more by the purpose of stamping with disapprobation what in its judgment could, at most, be of but rare occurrence, than by the importance of fixing a heavy penalty to an offence so revolting as to need little, if anything, other than the restraints of social and moral sensibility. Mr. Minor's conclusion seems to be that, in either of the cases named, though the marriage is void *per se*, it would be prudent to obtain a divorce, if either party desire to marry again. 1 Minor's Inst. 261-2. This position of Mr. Minor indicates that, in his view, there are certain responsibilities, other than criminal, and certain rights incident to, or that may flow from a void marriage, which the law will regard.

Now, looking to the very comprehensive language of section seven, we have no authority for saying, nor could we be excused for assuming, that, for the purposes of this case, that language has no application. It is true that that provision was

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incorporated into our Code as long ago as 1785, and was not adopted with reference to, or intended to confer any benefit or right upon the colored race,—the negro in Virginia, at its passage, being a mere chattel. Hence in *Stones v. Keeling*, 5 Call, 148, Roane J., commenting upon the broad humane policy of this same provision of our law, and answering the argument of counsel, said: "It was also said, by the same gentleman, that my construction would legitimate the children of a white man and a negro woman, when the marriage ceremony has taken place. The answer is easy and evident. The law concerning marriage is to be construed and understood in relation to those persons only to whom the law relates; and not to a class of persons clearly not within the idea of the legislature when contemplating the subjects of marriage and legitimacy." The law thus enacted without reference to, or with any intention on the part of the legislature to benefit the negro, in his then status, stands unchanged to-day, and we are bound upon well settled principles, to presume that it remains unchanged by deliberate legislative design, founded in the enlightened humane policy which disdains to visit the sins of the parent upon the unoffending child. True, by our statute, Acts 1877-8, above referred to, the marriage of a white person with a negro is a crime, and though the marriage be entered into beyond the limits of the State, where such marriage is lawful, yet, if the parties reside in this State and go beyond its limits and are lawfully married in accordance with the laws of the State or place where the marriage is celebrated, and then return to their domicile here, they are amenable to the law which they have sought to evade. This subject was very fully discussed by Christian J. in *Kenny v. The Commonwealth*, 30 Gratt. 858; but obviously the doctrine discussed and the principles laid down in that case, have no application to this case. As touching the parties to the marriage, that case was like this; there a black man and a white woman, domiciled in Augusta county, Virginia went to Washington city, and were there duly married, but returned

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immediately to their home in this State. There was a prosecution and conviction, which upon writ of error was affirmed by this court. Had there been a similar prosecution against the parties to the marriage, the parents of the appellants in this case, the result would, doubtless, have been the same. But this is no criminal prosecution for either bigamy or the marriage of a white person with a negro; but here the children, the unoffending offspring of a repulsive alliance, come asking only the protection which, in unmistakable terms, the law in its benignity, extends to them; and when too, there is not even an adversary claimant to that which they seek as rightfully their own. Surely they are entitled to it by the plain language: "If a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendants, if recognized by him before or after the marriage, shall be deemed legitimate," &c. The law was on the statute book irrespective of the black man, and many years before the negro attained to his present status. The law has stood still; but in the meantime, the negro has grown into its gracious protection; he has been clothed with citizenship; he is, in the language of the statute, a man, and while the idea of amalgamation is repugnant to the white race, and intermarriage between the races is prohibited under heavy penalties by the law, yet the dominant white race has not yet struck, nor will it likely ever strike at the natural legal rights of unoffending children through the sins of their parents. The policy of our law is quite the contrary. The argument on behalf of the appellee that Dade Hooe and Hannah Greenhow were not really married, but only attempted to commit an act which the law declares to be absolutely void, is utterly fallacious. Had they after marriage, remained in the District of Columbia, or outside of this State, the Virginia law would not have been violated, and they could not have been pursued. It might as well be said that persons similarly situated, and never residents of this State, but duly married in the District of Columbia or

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other place where such marriages are lawful, could not become residents of this State. This would be so palpably in violation of the principle of comity between the States that the idea could not be for a moment entertained.

Again, bigamous marriages are absolutely void, yet the law legitimates, in its humanity, the innocent issue of such marriages. Bigamous negro marriages are punishable just as such marriages between white people are punished. In each case it is the crime which the law abhors and punishes, and not the unfortunate issue of the marriage which in law is void.

Dade Hooe lived a life greatly offensive to the law and society. In his old age he did what in the eye of the law and good morals was perhaps the best thing he could do under the circumstances; he sought to relieve his acknowledged children from the blight and curse of bastardy; and in this he doubtless did what he thought was best in attempting to advance the interest of those who had the greatest claim upon his affection and bounty.

Stone v. Keeling, 5 Call, 143, was a case in which the issue of a woman by a second marriage, which took place during the lifetime of her first husband, were held legitimate after the death of their father. In delivering the opinion, Roane, J., said: "This is a mere civil controversy to ascertain the right of property." And the judge was careful to remark upon the importance of keeping the first marriage out of view, thus taking the precaution of shielding the children against the criminal bigamous act of their mother. Further on the same judge says: "The second marriage, therefore, was not lawful; it was even void; but we cannot, in this case, say it was *criminal*. * *

* * * * * But if it were otherwise, if the legislature should ever be supposed to consider every second marriage, living a first husband or wife, as criminal, wherefore should they visit the sins of the parents upon the innocent and unoffending offspring? But this was not the temper of the legislature. In the case of incestuous marriages, when the parties with the full

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knowledge of the everlasting bar which does and ought to exist between them, enter into this contract, and produce an innocent offspring in defiance of laws human and divine; where you cannot suppose a circumstance of excuse, except the scarcely possible one of an ignorance of the consanguinity which exists between the parties, their offspring is not bastardized by our laws." The reasoning of Judge Roane is peculiarly appropriate to the case in hand; and it is difficult to conceive how, upon principle, a distinction can be taken between that case and this. Bigamy is a crime; so is marriage between white and colored persons. In fact, if I was guided only by the punishment inflicted, as has been shown, the latter is the lesser offence. I think this case is ruled by *Stone v. Keeling*, *supra*. Many other authorities to the same effect might be cited. I may mention *Sleigh v. Striver*, 5 Call, 439; 3 H. & M. 225; *Bennett v. Toler*, 15 Gratt. 621-2; *Coutts v. Greenhow*, 2 Munf. 363; *Ash v. Wey's adm'r*, 2 Gratt. 203: and other cases which go further and hold that though the parties leave the state where the marriage is prohibited and to evade the law of their domicile, and are married and return to their domicile, still the marriage is valid. *Putnam v. Putnam*, 8 Pick. (Mass.) 433; *Medway v. Needham*, 16 Mass. 157. For an able and exhaustive discussion of the whole subject, upon a full examination of all the authorities, see *Van Voorties v. Brintwall*, 86 N. Y. (court of appeals) 18.

In view of all the circumstances, I am of opinion, that by virtue of the marriage of Dade Hooe to Hannah Greenhow, in the city of Washington, and the continuous recognition of their children, the appellants, both before and after said marriage by Dade Hooe, their father, they are his legitimate children, and as such entitled to the fund in question; and that therefore the decree of the court below should be reversed and annulled.

DECREE CONFIRMED.

Richmond.

WITHERS' ADM'R AND ALS. v. SIMS AND ALS.

JANUARY 8TH, 1885.

1. PRACTICE IN CHANCERY—*Multifariousness*.—A bill brought to obtain a construction of a will and the recovery of property held by several persons by titles derived under the same will, is not multifarious.
2. IDEM—*Jurisdiction—Remedy at law*.—Bill in equity will not lie merely to save necessity of several actions of ejectment. But where the title of all the parties to the property in controversy depends upon the construction to be given to the will, a bill will be entertained to construe the will and settle the title of several parties to the property at the same time.
3. IDEM—*Res judicata—Parol evidence*.—Where judgment or decree is relied on as estoppel, and pleadings and proceedings in former suit leave it doubtful what was the issue, or state of facts whereon the judgment or decree was rendered, parol evidence is admissible in subsequent suit to show what was actually in issue and determined by former suit.
4. IDEM—*Res judicata—Estoppel*.—All matters presented and received, or presentable to sustain the particular demand litigated in prior suit, and all matters presented or presentable under the issue to defeat such demand, are concluded by the judgment or decree in the former suit.
5. WILLS—*Construction—Res judicata—Case at bar*.—In 1871, testator willed property to be held by his executors in trust for G. and E., until they respectively arrive at twenty-one, or marry; if either die without lawful issue, then the whole to be held for the survivor until twenty-one; and if survivor be twenty-one at time of such death, then the whole to go to him; but should both die without lawful issue, then the whole to revert to testator's estate. Executors declining, B. qualified as administrator *c. t. a.* In 1872, G. and E., still minors, brought their bill against administrator *c. t. a.* and testator's children, reciting the will and praying the court to decide if the trusts in the will devolved on the administrator *c. t. a.*, and if not, to appoint a trustee to execute

Syllabus—Statement.

those trusts, and to direct him to pay G. and E. a reasonable sum for their maintenance. The court decided that G. and E. each had a vested estate, subject to be divested, and if either died under twenty-one, the whole to go to survivor; that the estate being vested, G. and E. each was entitled to maintenance out of it; and that each was entitled to the possession of his portion when he attained twenty-one, or married. G. and E. both attained twenty-one and died without lawful issue. In 1881, testator's children brought their bill against G. and E.'s representatives for construction of the will and recovery of the property. Defendants answered, citing the decree of 1872, as having properly adjudicated the issues raised by the bill last mentioned.

HELD :

1. The matters put in issue by the bill of 1881, were not embraced in the issue presented by the bill of 1872, and are not *res judicata*.
2. G. and E. each took a vested equitable estate in fee, subject to be divested only on the death of each under twenty-one, without lawful issue, and so soon as each of them arrived at twenty one, his estate became absolute and indefeasible.

Appeal from decree of circuit court of Pittsylvania county, rendered December 15th, 1882, in the chancery suit wherein W. H. Sims and wife, John R. Wilson and George W. Clark and others are plaintiffs, and E. D. Withers in his own right and as administrator of Edward Withers, deceased, Charles C. Miller, executor of George W. Withers, J. D. Blair, adm'r c. t. a. of George Wilson, deceased, William Thomas and others, are defendants.

The object of this suit is to construe the will of George Wilson, deceased, and to recover the property bequeathed and devised thereby to his grandsons, George W. Withers and Edward Withers, both of whom died after attaining twenty-one years of age, and without lawful issue. The decree of the circuit court being unfavorable to the defendants, they applied for and obtained from one of the judges of this court an appeal and writ of *supersedeas*.

Opinion states the case.

Carrington & Fitzhugh and E. E. Bouldin, for the appellants.

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John W. Rieley and L. C. Berkeley, Jr., for the appellees.

HINTON, J., delivered the opinion of the court.

By the second clause of his will, George Wilson, of the county of Pittsylvania, who died many years ago, made the following devise and bequest:

"Second. After the death of my wife, I give to my executors, hereinafter named, in trust for my grandchildren, George W. Withers and Edward Withers, the tract of land and all of the personal property devised in the above clause to my wife for life, and also two-thirds of any debts or stock due me, or of any money on hand at my death. The property named or referred to in this clause is to be held by my executors aforesaid in trust for my said grandchildren until they shall respectively attain the age of twenty-one or marry. Should either of my said grandchildren die without lawful issue, then I wish the whole of the property named in this clause held by my executors hereinafter named in like manner for the survivor of said grandchildren, until such survivor arrives at twenty-one years of age; or if he shall be twenty-one years of age at the time of such death, then I wish the whole of the property named in this clause to go to him: but should both of my said grandchildren die without lawful issue, then I wish the whole of the property named or referred to in this clause to revert to my estate and be divided among my heirs and distributees according to the laws of Virginia."

The testator, by other clauses of his will, gave also to his wife, in fee simple, one-third of the debts due him, stock and money, and one-third of the proceeds of the sale of certain land, (which he had directed his executors to sell), and the other two-thirds he gave to his executors in trust, for his said grandchildren, "subject to the same trusts and conditions as to the property bequeathed to them" in the second clause of his will.

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The testator's wife died in his lifetime, and all of the persons named as executors in the will refusing to qualify, the estate was committed to J. D. Blair as administrator *c. t. a.* Soon thereafter, in January, 1872, these same grandchildren, Edward and George W. Withers, who were minors, by their next friend, brought suit in the circuit court of the county of Pittsylvania, against the said administrator, the children of the testator and the husbands of the testator's daughters; but the scope and effect of this suit, being one of the controverted questions in this appeal, need not now be stated further than to say that it is admitted that it called on the court to declare whether or not the trusts of the will devolved on the said administrator, and if not, to have a trustee appointed to execute them; whether in consequence of the death of the wife in the testator's lifetime, the testator died intestate as to one-third of the stock, debts and moneys given to her absolutely, or the same passed to the grandsons along with the two-thirds thereof bequeathed to them; and further to have an allowance made to them for their maintenance and education during their minority from said property. To this suit the administrator appeared and answered, but it seems doubtful whether any appearance was made by the other defendants. The court in its decree held that the trust devolved on the administrator *c. t. a.*; "that the property bequeathed and devised to the said plaintiffs, George W. Withers and Edward Withers, was a vested interest to be held by the nominated trustees for the benefit of said George W. and Edward Withers, subject to be divested and go to the survivor, if either died under twenty-one years of age, or if one died under twenty-one years of age, leaving the other who attained twenty-one years of age the portion given to the deceased one, or the whole to belong to such survivor;" and that "being a vested estate, the plaintiffs are each entitled to a reasonable maintenance out of said estate;" and that each of the plaintiffs is entitled to his portion of said estate when he attains the age of twenty-one years or marries. In this suit par-

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tition was made of the real estate, and, under the direction of the court, all the other estate devised to the minors was by the administrator turned over to them as they became of age. At the September term, 1874, a final decree was entered and the cause was stricken from the docket. The personal estate has been disposed of by the grandchildren as they pleased, and some of the land has been sold, whilst some of it has been conveyed away by them to secure debts contracted by them since they became of age. In the year 1877, Edward Withers, the younger of the two, died intestate, aged twenty-four years, and in 1880, the elder of the two, George W. Withers, who was then twenty-eight years of age, died, leaving a will which was duly probated. Their father, E. D. Withers, inherited from his son Edward his estate, and took by devise the estate of his other son, George W. Withers.

In 1881, the heirs of the testator, George Wilson, who were the same persons who were defendants to the former suit, except Mrs. Clark, who died in 1874, and whose interest is now represented by her children, instituted the present suit in the circuit court of Pittsylvania, to have the court construe the will of the deceased, in respect to the contingency that had happened, the death of both grandchildren without lawful issue; at the same time claiming that the estate devised to the said Edward and George W. Withers reverted, under the provisions of the will, to them. The bill sets out the proceedings in the former suit; says that the plaintiffs are advised "that it was the intention of the testator, George Wilson, that all of the property devised and bequeathed as aforesaid to his said grandsons should be divested and pass to his heirs and distributees, if his said grandsons should die at any time without lawful issue;" denies that the complainants are precluded from recovering the property which was inherited by and devised to E. D. Withers, and that which had been sold or conveyed in trust as security for their debts by the grandsons in their lifetime, by any of the decrees or proceedings in the former suit. To this bill the ad-

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ministrator, with the will annexed, of George Wilson, deceased, the personal representatives of the said Edward and George W. Withers, their heirs at law and distributees, the persons who had acquired from the grandchildren in their lifetime any of the lands embraced in said devise, and the trustees and beneficiaries in the deeds of trust aforesaid, or the said realty, were made defendants. To this bill the administrator *c. t. a.* filed an answer, in which he says: That in 1871, he informed the guardian of these grandsons that his counsel, Messrs. Robertson & Green, had advised him it was necessary to have the will of George Wilson construed; that the former suit was therefore brought, "and said will was fully construed at the June term, 1872;" he says that the construction placed on said will in the former suit was that Edward and George W. Withers took each a vested interest in the real and personal estate devised and bequeathed to him, which was subject to be divested only on their dying under twenty-one years of age; and that as soon as either one arrived at twenty-one years of age, his estate became absolute and indefeasible. Demurrers and answers were filed by the other defendants. The defendant, E. D. Withers, also insisted in his answer: 1st. That the true construction of said will was, that when the grandsons became twenty-one years of age their title to the property was absolute and indefeasible; 2nd. That this question was so decided in the former suit, to which all the complainants, or those under whom they claim, were parties, and is therefore *res adjudicata*. A plea of *res adjudicata* was also filed by all of the defendants.

In December, 1882, the cause came on to be finally heard, when the court decided that the matter was not *res adjudicata*, and that the true construction of the will was that contended for by the plaintiffs, Sims and wife, and decreed accordingly.

Now the court is of opinion that the circuit court did not err in overruling the demurrers to the bill, and that the same is not multifarious. The object of the bill is to obtain a construction of the second clause of the will of George Wilson, and the re-

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covery of property held by persons by titles derived under the same. Upon the construction to be given to that instrument will depend the question, whether they are to retain or lose this property. They have therefore a common interest and a common defence, and in such a case may well be joined in the same suit. For whilst it is not competent for a plaintiff to demand several matters of different natures against several defendants, yet a demurrer will not lie, even though the defendants be unconnected with each other, if they have a common interest centering in the point in issue in the cause. *Almond v. Wilson*, 75 Va. R. 623; 2 Maddox Ch'y, 294. In the case with which we are dealing, as has been well said by one of the learned counsel for the appellees, "the will is the source of the title of them all to the property claimed by the plaintiffs in the suit, and its true construction is the pivotal point around which the interest of every party revolves." The bill, therefore, is clearly not amenable to the objection of being multifarious. Story's Eq. Pl., sec. 271; *Nulton v. Isaacs*, 30 Gratt. 738; *Walters v. Farmers Bank of Va.*, 76 Va. R. 16. It is not demurrable for a similar reason. Of course a bill in equity will not lie merely to prevent a party plaintiff from the necessity of having to bring several actions of ejectment, but in a case where the very title of all the parties to the property in controversy depends upon the construction to be given to the will of the testator, no good reason can be perceived for putting the parties to the expense and delay of separate actions of ejectment against each occupier of the land, and that too in advance of a determination of the proper construction of the will, a question in which the interests of all of the defendants are vitally involved. If the construction placed upon the will should happen to be that contended for by the appellants, it puts an end to the whole litigation, the convenient and logical course to be pursued, therefore, was that adopted by the plaintiffs: to come into equity upon a bill framed like the one in this cause, and have all of the matters deter-

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mined here, where the court can adapt its decrees to the proofs against each defendant, and can also properly apportion the costs.

It is next insisted by the appellants that the matter now litigated is *res adjudicata*. That the circuit court did, by its decree of June 4, 1872, in the former suit, styled Withers, by, &c., v. George Wilson's adm'r, construe the will of George Wilson, in respect to the contingency which has happened, the death of both Edward and George W. Wilson, without lawful issue. Upon the point of what constitutes *res judicata*, the authorities are not in entire harmony. A few of them, however, will be cited, simply with a view of illustrating the essential features of the doctrine, so far as we deem them applicable to the case in hand.

In *Russell v. Place*, 94 U. S. R. 608, Mr. Justice Field, in delivering the opinion of the court, says: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to the operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." And says he: "To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

He further says, in that case, "that in the *Packet Company v. Sickles*, 5 Wall. 580, the general rule with respect to the con-

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clusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, was stated to be substantially this: that, to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined, that is, that the verdict could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

In *Chrisman's adm'r v. Harman & al.*, 29 Gratt. 499, the rule as stated in *Russell v. Place*, *supra*, is quoted with approval. Wells on Res Adjudicata, sec. 282; Freeman on Judgments, sec. 256.

Now let us apply these principles to the case at bar. It is true that the bill does advert to the provisions of the will, and suggests as the proper construction thereof the construction now contended for by the appellants; but upon a careful scrutiny of its whole frame, it seems to me, that its real objects are those disclosed in the special prayer of the bill, viz: to have the court decide whether the trusts of the will devolved on the administrator with the will annexed, and if not, to have the court appoint a trustee to execute them; and then to have a reasonable amount for support, education and clothing allowed them. And I am sustained in this conclusion not only by the fact that this was the view entertained of the objects of the bill by the administrator *c. t. a.*, at the time it was filed, as is shown by the statement in the answer of said administrator to that bill, that "the complainants' bill does not ask for any decisions upon this (meaning the construction of the will in the event that both of the grandsons should die after they had attained the age of twenty-one years, without lawful issue,) and other important questions of construction arising under the will, any further than is implied in the prayer, that some per-

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son be appointed to execute the trusts of the will in the place of this defendant;" but by the terms of the decree as well: for whilst that decree does in terms declare, that the property bequeathed and devised to the grandsons "was a vested interest to be held by the nominated trustees for the benefit of the said George W. and Edward Withers, subject to be divested and go to the survivor, if either died under twenty-one years of age, or if one died under twenty-one years of age, leaving the other who attained twenty-one years of age the portion given to the deceased one," * * "and being a vested estate, that said plaintiffs are each entitled to a reasonable maintenance out of said estate," it is silent upon the point which is now in issue, and which is made a practical question by the contingency that has happened. We recognize that it may be urged in opposition to this view that the administrator has in his answer in the present suit asserted that the will of George Wilson, the testator, was fully construed by the decree of June term, 1872, in the first suit, and that the same views were possibly entertained by others. At most, these must have been mere opinions, and no matter how honestly they may be held, they cannot prevail as against the actual record of what was done, impressed upon the face of the pleadings and proceedings. Freeman on Judgments, sec. 258. But by what is here said it is not intended to intimate that parol or extrinsic evidence may not be received in a subsequent suit to show what was actually in issue and determined on the trial of a former suit, where the judgment or decree is relied upon as an estoppel, and the pleadings and proceedings in the former suit leaves us in doubt as to the precise issue or state of facts upon which the judgment or decree was rendered. *Campbell v. Rankin*, 9 Otto, 263; *Davis v. Brown*, 94 U. S. R. 428; *Chrisman's adm'r v. Harman & al.*, 29 Gratt. 494. Nor is it intended to throw any doubt upon the proposition that "all those matters which were offered and received, or which might have been offered to sustain the particular claim or demand litigated in the prior action, and those

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matters of defence which were presented or which might have been introduced under the issue to defeat such claim, are concluded by the judgment or decree in the former suit," for to this extent the authorities certainly do go. *Davis v. Brown*, 94 U. S. R. 428; *Cromwell v. County of Sue*, Id.; *Malloney v. Horan*, 49 N. Y. 116; Wells on Res Adjudicata, secs. 211, 217, 252; Bigelow on Estoppel, 22; Freeman on Judgments, sec. 271.

It only remains for us to give our construction of the clause of the will under consideration, which may be briefly done. No doubt the rule of construction, recognized as well in this country as in England, as applicable in the construction of the limitation under examination, is, that where there is a gift over in the event of death without issue, that direction must be held to mean death without issue at any time, and the introduction of a previous life estate does not alter that principle of construction. *O'Mahoney v. Burdett*, L. R. 7 Eng. and Ir. Appeals, 399; *Ingram v. Souther*, Id. 408; *Olevant v. Wright*, L. R. 1 Chy. Div. 349. But this rule, like all other general rules of construction, can have no application when a contrary intention appears in the will. *Tebbs v. Duval et als*, 17 Gratt. 361; *Smith's Ex'or v. Smith*, 17 Gratt. 286; *Olevant v. Wright*, *supra*. Here the intention sufficiently appears on the face of the will. The words of the will are: "Second. After the death of my wife, I give to my executors, hereinafter named, in trust for my grandchildren, George W. Withers and Edward Withers, the tract of land and all of the personal property devised in the above clause (meaning the first clause of his will) to my wife for life, and also two-thirds of any debts or stocks due me, or of any money on hand at my death." By these words the testator undoubtedly gave an equitable fee simple estate in the property devised. Had these grandsons been of age, no doubt he would have given it to them without the intervention of trustees, but recognizing that they were minors, he directs that it shall be held by his executors "in trust until they shall respectively attain the age of twenty-one or marry." Now had the will stop-

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ped here, there could have been no question but that each of these grandsons would have been entitled, so soon as they became of age or married, to this property, as their absolute and indefeasible estate, for the language is too plain to admit of doubt, or to require construction. Here, then, is a clearly defined purpose that the trusts shall cease at the farthest when the grandchildren shall become of age, and sooner if they shall marry. And although this will must be read as a whole, this clear and unambiguous provision cannot be controlled by mere inference and argument from any general or ambiguous provisions in other parts of the instrument. *Rayfield and wife v. Gaines*, 17 Gratt. 1; *Simmerman v. Singer*, 29 Gratt. 16. But, the testator realizing that one or both of these grandsons might die without lawful issue before the period when according to his original or primary purpose these estates were to become absolute and indefeasible, then undertakes to provide for these cases by the words: "Should either of my grandchildren die without issue, then I wish the whole of the property named in this clause held by my executors, hereinafter named, in like manner for the survivor of said grandchildren until such survivor arrives at twenty-one years of age." Thus, again showing a purpose to adhere to his original intention to only continue the trust at farthest until his grandsons should become twenty-one years of age. Then recollecting that it was possible that the survivor might be above twenty-one years of age at the time of the happening of this contingency, viz, the death of one of his grandsons under twenty-one without issue, he adds, as a matter of course, "if he (the survivor) shall be twenty-one years of age at the time of such death, then I wish the whole of the property named in the clause to go to him." He then goes on in the same sentence: "but should both of my said grandchildren die without lawful issue, then I wish the whole of the property named or referred to in this clause to revert to my estate," etc. Now here the testator employs fewer words to express his meaning, but it seems to me very clear

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that he was using the words "die without lawful issue" in the same sense that he had used those words in the first instance. By the first provision the gift was made full and complete, and it was only necessary to provide for the turning over of the property to them as they became twenty-one years of age or married. This last sentence should be read in the light of this original purpose. We think we must do as was done by vice-chancellor Sir Lancelot Shadwell, in *Wheable v. Withers*, 16 Simons, 507, read this sentence as if the words, "under the age of twenty-one years" were a part thereof. *Kilpatrick v. Kilpatrick*, 13 Ves. 476.

The court is of opinion that the said grandchildren took each a vested equitable estate in fee in the property devised and bequeathed to them, which estate was subject to be divested only on the death of each under twenty-one years of age, without lawful issue, and that so soon as each of them arrived at the age of twenty-one years, his estate became absolute and indefeasible.

The court is therefore of opinion that so much of the decree of the circuit court of Pittsylvania appealed from, as is in conflict with this opinion, is erroneous, and must be reversed and annulled; and that a decree must be entered in conformity with the views herein expressed.

LEWIS, P. and FAUNTLEROY, J., concurred in the opinion.

LACY, J., concurred in the result.

RICHARDSON, J., dissented.

DECREE REVERSED.

Staunton.

DUFFY & BOLTON v. FIGGAT.

SEPTEMBER 17TH, 1885.

LEWIS, P., Absent.

1. APPEALS—*Jurisdiction—Plaintiff appellant—Defendant appellant.*—If plaintiff's claim exceed \$500, and he apply for appeal, this court hath jurisdiction, though the judgment or decree be for less. But if the judgment or decree be for less than \$500, principal and interest, at the date of the decree, and the defendant apply for appeal, this court hath not jurisdiction.
2. IDEM—*Special commissioners—Defalcation.*—Where purchasers at judicial sale are compelled to pay a second time a part of purchase money, by means of the special commissioner's failure to give required bond, and his default in paying over money collected of them, the jurisdiction of this court to hear their appeal, depends on the amount of the defalcation, and not on the amount of his official bond.

Appeal from decree of circuit court of Botetourt county, rendered July 1st, 1884, in the chancery cause of Hammond *against* Hines, dismissing on demurrer a petition filed by Duffy and Bolton, parties to said cause, and purchasers of land sold under a decree therein, by Houston and Figgat, special commissioners, to rehear and reverse a decree in said cause, rendered May 31st, 1883, and deciding that the joint official bond, in penalty of \$4000, on its face apparently complete, and executed April 18th, 1874, by said special commissioners, and by them, or one of them, placed among the papers in the cause, was not binding on the obligors therein, on the ground that it

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had been there placed with the understanding that it was not to be deemed completed until said Houston procured it to be executed by some approved surety.

Opinion states the remaining facts.

Haden & Haden, for the appellants.

J. H. H. Figgat, for the appellee.

LACY, J., delivered the opinion of the court.

This is an appeal from the decree rendered in this case on the 31st of May, 1883, and at the June term, 1884. The case is as follows, so far as it is necessary to state the facts:

In the suit in the circuit court of Botetourt of Hammond *against* Hines, instituted in April, 1869, brought by the plaintiffs, Hammond and others, to subject the lands of Robert Hines, deceased, to the payment of the debts of the said Hines, deceased, due to the said Hammond and others, a decree was entered in the cause directing the sale of the said lands, and the appellee Figgat and T. D. Houston were appointed commissioners to execute the decree, and required to execute bond in the penalty of \$100, and again, to collect the purchase money, to execute a bond with security, in the penalty of \$4000. These bonds were executed without security, and the money collected in part by one commissioner and in part by the other. The money collected by Figgat was accounted for by him; and the money collected by Houston was accounted for in part by Houston, but as to \$248.28 of the money collected of the appellant Duffy, the said Houston defaulted; and as to \$87 of the money collected of Bolton, Houston defaulted in like manner, and left the State. The court decreed against the said Duffy and the said Bolton respectively for these sums, and required them to pay a second time the said sums, which decree was accordingly enforced.

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From this ruling and action of the circuit court, the said Duffy and Bolton have appealed to this court.

They insist, that as the bond of the said commissioners was a joint bond, it was the bond of both, and that Figgat should be made to answer for the acts of his co-commissioner, Houston. But Figgat contending that this bond was never delivered to the clerk, except upon condition that it should be held by the clerk until Houston should furnish securities, in accordance with the decree of the circuit court, and that as that was never done, it was never a completed bond; and the circuit court so holding, decreed against the purchasers for the default of Houston, and not against Figgat, as security for Houston.

The appellee insists, first, in this court, that as the amount of the defalcation of the said Houston, was less than \$500, and the amount decreed against the appellants was under \$500, their grievance, whatever it be, is not within the jurisdiction of this court, and that the appeal must be for that cause dismissed; and this is the first question to be considered by this court.

The jurisdiction of this court is limited to an amount not less than \$500. The amount actually in dispute is the criterion of jurisdiction; the plaintiff's claim determines the jurisdiction on his side; and the amount adjudged or decreed to be paid by the defendants ascertains it on his. In calculating the amount involved in the decree appealed from, all costs are excluded, and interest is not estimated beyond the date of the decree. The matter in controversy must not only be of the value of \$500, but the controversy in relation to matter of that value must be continued by the appeal. And it has been held in this court, that although the action was for more than the requisite amount, but the verdict was for less, the court would not take jurisdiction upon the appeal of the defendant. *Leris v. Long*, 3 Munf. 136; *Gage v. Crockett*, 27 Gratt. 735; *Harman v. The City of Lynchburg*, 33 Gratt. 37; *Barton's Ch. Practice*, 1110; *Bachelder & Collins v. Richardson*, 75 Va. 835; *Campbell v. Smith*,

32 Gratt.; *Buckner v. Metz*, 77 Va. 107; *Umbarger v. Watts*, 33 Gratt. 167.

The matter in controversy is that which is the essence and substance of the judgment, and by which the party may discharge himself. The matter in controversy is that for which the suit is brought, and not that which may or may not come in question.

These authorities seem to be conclusive of the present case, for, as already stated, the only matter in dispute is the amount for which Houston defaulted, and which has been decreed against the appellants.

The amount claimed against Duffy is, principal and interest, at the date of the decree, \$270.02, and the amount claimed against Bolton, is \$142; and the decree against these appellants for these sums, is the ground of their appeal; and by the payment of these sums, which are less than \$500, the appellee could discharge himself of their entire claim against him. And the amount in controversy thus appears to be below the jurisdictional sum necessary to give jurisdiction to this court.

The appeal must therefore be dismissed for want of jurisdiction.

APPEAL DISMISSED.

Staunton.

JENKINS & CUTCHIN v. WALLER & JORDAN.

HOWELL v. WHITEHILL.

SEPTEMBER 17TH, 1885.

1. **INJUNCTIONS—*Dissolution—Continuance.***—It rests in the sound discretion of the court to dissolve an interlocutory injunction upon the coming in of the answer denying the equities of the bill, or to continue it to a final hearing on the merits, especially where fraud is the *gravamen* of the bill, or where dissolution would result in greater injury than continuance till hearing.
2. **IDEM—*Continuance—Cases at bar.***—Mercantile firms having on hand large stocks of perishable goods, confessed judgments for large sums in favor of certain preferred creditors. Executions were issued and levied, and the goods advertised for sale. Unpreferred creditors bring their bill charging fraud in the confession of said judgments, usury in the debts whereon the judgments were founded, want of jurisdiction in the courts wherein they were confessed, etc., and obtain injunction to sale, and appointment of receiver to take charge of the goods, and sell same publicly or privately, upon giving bond in sufficient penalty. Judgment creditors present their answers to the bill, and move to dissolve injunction in vacation. No depositions had been taken; but affidavits sustain the allegations of the bill, and receiver had executed ample bond and taken possession of the goods. The motion to dissolve was overruled, and the injunction continued to the hearing on the merits, the decision of all questions being reserved until then:

HELD:

Such action is sustained by sound judicial discretion under the circumstances, and should be affirmed.

The appeals in the two causes above styled were argued at Richmond but decided at Staunton.

Statement—Opinion.

The first is from three decrees of the circuit court of Southampton county rendered in June and July, 1883, in the cause of Waller & Jordan and als, plaintiffs, against Jenkins & Cutchin and als, defendants.

The second is from decrees of the circuit court of Isle of Wight county rendered in June, 1883, in the cause of Howell & Co. and als, plaintiffs, against Whitehill & Co. and als, defendants.

The facts in the two causes are so exactly similar in all respects that they were argued and submitted as one cause, and the opinion which states the facts of the first cause is exponential of the facts of the last.

White & Garnett, Baker & Son and H. R. Griffin, for the appellants

R. R. Prentis, for the appellees.

FAUNTLEROY, J., delivered the opinion of the court.

The facts necessary to be stated are as follows, viz: On the 27th of June, 1883, the plaintiffs, Waller & Jordan and others, filed their bill in the clerk's office of the circuit court of Southampton, Virginia, alleging that William H. Jenkins, J. F. Cutchin, Joel H. Cutchin and C. A. Cutchin, merchants and partners, trading as Jenkins & Cutchin, and doing business in the town of Franklin, Southampton county, Virginia, are justly indebted to the said complainants, Waller & Jordan, in the sum of \$102, by an itemized account filed with the bill, and marked Exhibit No. 1; to Sickel, Hellen & Co. in the sum of \$330.84, by an account filed with the bill and marked Exhibit No. 2; to Bruff, Maddox & Faulkner in the sum of \$870.19, by an account filed with the bill and marked Exhibit No. 3; to J. Whitehill & Co. in the sum of \$688.50, by an account filed with the bill and marked Exhibit No. 4; aggregating an indebtedness to the

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said complainants of \$1991.53; the consideration of all which being goods, wares and merchandise recently bargained, sold and delivered to the said Jenkins & Cutchin by the said complainants, respectively, in the usual course of trade, and for which complainants have never been paid. That the said Jenkins & Cutchin have recently purchased and now have in their store in Franklin, Virginia, a very large stock of general merchandise, supposed to be worth over \$20,000. That on the 14th day of June, 1883, in the clerk's office of the circuit court of the city of Norfolk, the said William H. Jenkins and J. F. Cutchin confessed a judgment in favor of the said Joel H. Cutchin and C. A. Cutchin, merchants and partners trading as J. H. Cutchin & Co., for the sum of \$11,584.77, with interest thereon from June 8, 1883, until paid, and \$18.20 costs. That on the 15th day of June, 1883, in the clerk's office of the circuit court of the city of Norfolk, the said William H. Jenkins and J. F. Cutchin confessed a judgment in favor of J. J. Cutchin for the sum of \$1225, with interest thereon from the 8th day of June, 1883, until paid, and \$7.90 costs; and also a judgment in favor of M. L. T. Davis and B. D. Thomas, merchants and partners, trading as M. L. T. Davis & Co., for the sum of \$1283.66, with interest thereon from the 8th day of June, 1883, until paid, and \$7.90 costs. That executions of *fiery facias*, founded upon the said judgments, respectively, were immediately issued and placed in the hands of W. W. Briggs, sheriff of Southampton county, who levied the same upon the said stock of general merchandise in the said store of Jenkins & Cutchin in the said town of Franklin.

The said complainants charge, that the said confessed judgments, writs of *fiery facias*, and levies made thereunder, are, each, illegal, and null and void as to complainants, because the supposed causes of action upon which the said suits are based, nor any part of either of them, arose in the city of Norfolk, but the same, and each and every part of the said supposed causes of action, arose in Southampton county, Virginia: and

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because the defendants, William H. Jenkins and J. F. Cutchin, neither of them, do not reside in the city of Norfolk, but are both residents of Southampton county, Virginia; and, therefore, that the circuit court of the said city of Norfolk, had no jurisdiction in the said actions at law, or authority to render the said judgments; and that the clerk of the said circuit court of Norfolk city, had no authority to issue the said writs of *fiери facius*, because the term of the court at which the said judgments would become final had not ended, nor even begun, nor had the said circuit court of the city of Norfolk entered any order allowing executions to be issued in the said cases; and that, therefore, the said executions do not create or operate any lien upon the said stock of general merchandise.

That the said W. W. Briggs, sheriff of Southampton county, proposes to sell the said stock of general merchandise, in Franklin, at public auction, for cash, on July 2d, 1883; that the sale of so large a quantity of goods, for cash, in so small a place as Franklin, and without extensive advertisement, would be a great wrong to complainants, because of the sacrifice of their said property at prices much below its real value.

That the said Jenkins and Cutchin are insolvent and heavily indebted; and that the said confessions of judgment were made in pursuance of a collusive bargain between the said William H. Jenkins, J. F. Cutchin, Joel H. Cutchin, C. A. Cutchin and J. J. Cutchin, with intent on their part to hinder, delay and defraud the complainants and other creditors of Jenkins & Cutchin; and that the said bargain, judgments and executions, are founded upon considerations not deemed valuable in law, and are voluntary, fraudulent and void as to complainants.

The bill further charges, that the said Joel H. Cutchin and C. A. Cutchin, are partners of the said William H. Jenkins and J. F. Cutchin, jointly interested in the profits of the business of Jenkins & Cutchin; that they participated in the said profits; furnished capital for the conduct of the said business; were in the habit of accepting drafts drawn upon them in the name of

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the firm ; and, in general, so conducted themselves as to induce the complainants to credit the firm of Jenkins & Cutchin on the faith of their connection with it. That the indebtedness alleged to exist from the said William H. Jenkins and J. F. Cutchin to the said Joel H. Cutchin and C. A. Cutchin, if any such there be, arises on a settlement of their partnership accounts; and is, in great part, composed of an usurious rate of interest contracted to be paid by the said William H. Jenkins and J. F. Cutchin, for the loan or forbearance of money, contrary to the statute, in such case made and provided.

The bill calls for the strictest legal proof of the amount and *bona fide* character of the alleged indebtedness to J. H. Cutchin & Co. and to J. J. Cutchin.

The bill charges the insolvency of the said Jenkins & Cutchin; and that the assets of the said firm consist of the said stock of general merchandise, and certain debts due to the firm, evidenced by their book accounts, notes, bonds, and other evidences of debt.

The bill makes William H. Jenkins, J. F. Cutchin, Joel H. Cutchin and C. A. Cutchin, merchants and partners, trading as Jenkins & Cutchin; the said Joel H. Cutchin and C. A. Cutchin, merchants and partners trading as J. H. Cutchin & Co.; J. J. Cutchin, M. L. T. Davis and B. D. Thomas, merchants and partners trading as M. L. T. Davis & Co.; and W. W. Briggs, sheriff of Southampton county, parties defendant to the suit, and prays for an injunction to prohibit and restrain William H. Jenkins, J. F. Cutchin, Joel H. Cutchin, C. A. Cutchin, J. J. Cutchin, M. L. T. Davis, B. D. Thomas and William H. Briggs, their agents and attorneys, and all other persons, from proceeding to sell, or in any other way disposing of the said stock of dry goods and general merchandise in the store recently occupied by Jenkins & Cutchin in the town of Franklin, Southampton county, Virginia, and from collecting any debts due to the said firm, or disposing of any of the assets of the said firm by any ways or means whatsoever; and prays for the appoint-

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ment of a receiver to take charge of the said stock of general merchandise, and to make sale of the same upon reasonable credit, after due advertisement, under the decree of the court; to collect the outstanding indebtedness due to the said Jenkins & Cutchin; and praying for the payment of the debts due to complainants by the said Jenkins & Cutchin, out of the proceeds of the said sale, and for the distribution of the fund among the *bona fide* creditors of the said Jenkins & Cutchin, to the exclusion of any debt due to either of the said partners, on a settlement of their mutual accounts; and for a reference to a master commissioner, and for general relief.

Upon this bill the judge of the circuit court of Southampton county awarded an injunction as prayed for, and on the 30th of June, 1883, appointed a receiver, and directed him to take into his possession the said stock of general merchandise and all other assets of Jenkins & Cutchin, and to sell the said stock at public or private sale, and authorized him to sell the same, as a whole, privately, for seventy-five per cent. of the cost value thereof. The receiver at once gave the required bond, with security, for \$25,000, took possession of the property, and proceeded to sell the same according to the terms and authority of the said decree of June 30, 1883.

On the 17th day of July the cause was heard by the judge on the motion of the defendants to dissolve the injunction, upon the bill and answers and exhibits and affidavits filed, and general replication to the answers, and was argued by counsel, whereupon the following order was made, viz: "On consideration whereof, the court being of opinion that the cause should be further proceeded with, and without deciding any of the principles, doth overrule the said motion, and continue the said injunction; and all other directions are reserved."

On the 21st day of July, 1883, an appeal was allowed and a supersedeas awarded by this court to the foregoing order of the circuit judge of Southampton county, with directions, that, upon the execution of an appeal bond in the penalty of \$5,000,

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the stock of goods in the hands of the receiver should be restored to the sheriff, under the executions levied by him upon the same. The bond was given, the stock of goods restored, and the stock was sold by the sheriff under the said executions, realizing about \$10,000. The book accounts, notes and other assets, aggregating some \$5,000, were not sold by the sheriff.

The case of *Howell & Co. and others v. Whitehill & Co. and others*, is exactly similar in all respects, and was argued and submitted along with this case above stated to be decided as one case.

The bills filed in these causes were not pure bills of injunction; they are creditors' bills, seeking to recover debts, and to prevent the insolvent debtor, mercantile firms, from squandering their assets. They charge that the firms of Jenkins & Cutchin, and Howell & Co., were colluding and conspiring with the creditors, in whose favor they had confessed large judgments, to sacrifice their assets, by a forced cash sale, to the detriment and damage of their other creditors. The bills show, on their faces, ample ground for the interlocutory injunctions, and their allegations were sustained by affidavits. The acts of confessing judgments, and placing their assets in the hands of the sheriff for sale, were such acts of insolvency by the debtor firms as entitled their unpreferred creditors to have the aid and intervention of a court of equity to prevent a sacrifice of the property, and to procure a due administration of the fund; and in the cases at bar, it cannot be held that the injunctions were improvidently awarded. The question, and the only question, presented for this court to decide, at this stage of the case, and until the lower court shall have decided and adjudicated some principle in the cause, is, was the action of the circuit court, or judge in vacation, in overruling the motion to dissolve and continuing the injunction till the hearing, erroneous? The orders entered in these causes, expressly and in terms, declare that the judge was of opinion that the cause should be further proceeded with, and, without deciding any of the principles, and reserv-

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ing all other directions, overruled the motion, and continued the injunction till the final hearing. The bills of complainant charged fraud, collusion, usury, technical irregularity, and that the judgments confessed were obtained with intent to hinder, delay and defraud creditors; that the debts for which they were confessed are tainted with usury; that the circuit and corporation courts of Norfolk city, had no jurisdiction to render the judgments; that the executions were improperly and unlawfully issued, and were, therefore, null and void; and that there was a combination to sacrifice the assets. These allegations are sustained by the affidavits and surrounding circumstances, so far, at least, as to justify the court in continuing the injunctions for the opportunity of testimony and final hearing of the cause. No time had been allowed for the taking of depositions, and none had been taken, and the causes were not ready for a hearing. The appellees are entitled to time and opportunity to prove the allegations of their bills; and until this opportunity has been given, the questions at issue cannot be adjudicated in the circuit court. No question has been decided in the circuit court; and there is no point or material in the records of these causes upon which this court can base a decision. There are grave issues of fraud, of usury, of partnership, of illegality in the judgments, and of illegality in the executions; upon none of which have the parties been heard. The circuit courts of Southampton and Isle of Wight counties, had jurisdiction to maintain these suits; the acts were done, and apprehended to be done, in these counties, and the suits were properly brought therein. (Code 1873, chapter 175, sec. 4, p. 1126; *Beckley v. Palmer*, 11 Gratt. 630.)

The injunction bonds were sufficient in penalty, and conditioned according to law. These creditors were getting no indulgence, they did not ask and could not obtain possession of the property levied on. They merely asked the court of equity to intervene and prevent a sacrifice of the assets of their insolvent debtors, and to hold it until their conflicting claims could

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be adjudicated, and to make an equitable distribution of the fund in controversy among those who should be determined to be lawfully entitled; and the court, in the exercise of its fair and full discretion, fully protected the rights and interests of all the parties by requiring adequate injunction bonds to pay the costs and damages, and receiver's bonds to cover the value of the property in controversy. The court properly refused to turn the assets which were the subject of litigation over to the appellants. One of the grounds for granting and continuing the injunctions was that these insolvent merchant debtors and their alleged judgment creditors were sacrificing a large amount of property by a forced cash sale on ten days notice. The very controversy was, who was entitled to the property or the fund, and until this issue could be tried and settled the general creditors had as much right to it as the judgment creditors, and the court properly took and held it in possession till the cases should be decided.

It rests in the sound discretion of the court to dissolve an interlocutory injunction upon the coming in of the answer denying the equities of the bill, or to continue it to a final hearing on the merits, if such course shall seem best calculated to subserve the ends of justice, and to protect the rights of all parties in interest. (High on Injunctions, sections 878-881-2-3.)

"It is to be constantly borne in mind, that the dissolution, like the granting of interlocutory injunctions, is largely a matter of judicial discretion, to be determined by the nature of the particular case under consideration. A dissolution, therefore, does not follow necessarily, and of course, upon the coming in of the answer denying the material allegations of the bill upon which the injunction issued, and the court may, in the exercise of a sound discretion, refuse a dissolution and continue the injunction to the hearing, where the circumstances of the case seem to demand this course. Especially will this course be exercised where fraud is the *gravamen* of the bill, or where it is apparent to the court that a dissolution of the injunction would

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result in greater injury and hardships than its continuance to the hearing: or where it is apparent, that by the dissolution, complainant would lose all the benefit which would otherwise accrue to him should he finally succeed in his cause." (High on Inj., sect. 899.)

"So where the case, as presented by the bill, is one which seems to require investigation, and the effect of dissolving the injunction would be to place the property which is the subject of controversy beyond the control of the court in which the action is pending, and would be equivalent to a complete denial of the relief sought by the bill, the injunction will not be dissolved." High on Inj., sec. 900. (*Nelson v. Armstrong*, 5 Grat. 354; *Beale v. Diggs*, 6 Grat. 591.)

The court was justified in appointing a receiver to convert the assets into money, because the property was expensive to keep and to guard, and was liable to many contingencies of depreciation, ruin and loss; and because it was evident, from the numerous petitions filed by the general creditors, that the mercantile firms were insolvent, making it proper and necessary for a court of equity to administer the assets and to distribute them with regard to the interests of all parties. These causes must be remanded to the circuit courts of Southampton and Isle of Wight counties, respectively, to be further proceeded in; and the appeal and *supersedeas* in each case be dismissed and vacated as having been improvidently awarded.

An order will be made requiring the appellants to deposit the funds arising from the sale of the property in some solvent bank, to the credit of these causes, to await the determination of the issues involved in the merits.

DECREE AFFIRMED.

Staunton.

CRONISE v. CARPER, RUDESILL & ALS.

SEPTEMBER 24TH, 1885.

Absent, LEWIS, P.

1. DECREE—*Null quoad persons not parties.*—A decree is a mere nullity as to persons not named as party in the bill, and against whom no allegations are made and no relief is prayed. *Moseley v. Cocke*, 7 Leigh, 224.
2. IDEM—*Case at bar.*—In suit to settle estate of R, deceased, C. set up a judgment against G., insolvent principal, and R. and P., sureties. G. and P. were not named in the bill. Leave was given to amend the bill, and make parties G. and P., and J. C., the alienee of P.'s land, which was bound by the judgment lien. Amended bill was filed, and C. and J. C., but not P., were summoned to answer it, but by order of plaintiff's attorney, it was dismissed at same rules at which it was filed. Account of liens was ordered and taken, showing that \$616 was P.'s portion, and a lien on P.'s lands aliened to J. C., who had been summoned to appear, and who did appear before the commissioner. Circuit court confirmed report, and decreed that J. C. pay to its receiver said sum of money. On appeal:

HELD:

1. J. C. was not, in any fair sense of the term, a party to the suit.
2. J. C. not being a party, the decree is a nullity as to him.
3. Without the presence of P. before the court, his lands could not be subjected to the judgment.
4. In no aspect of the case, was there any foundation for the *personal* decree against J. C.

Appeal from decree of circuit court of Botetourt county, rendered October 30th, 1883, in the cause of Eveline Rudesill, administratrix of John G. Rudesill, deceased, *against* John G.

Statement—Opinion.

Rudesill's heirs, Thomas G. Godwin, George W. Carper and als., creditors of decedent, by which decree Jacob Cronise, who was no party to said cause, was ordered to pay to William A. Glasgow, receiver in said cause, \$616.01, as of June 1st, 1883. From this decree Jacob Cronise obtained an appeal, and writ of *supersedeas*.

Opinion states the case.

G. W. & L. C. *Hansbrough*, for the appellant.

J. H. H. *Figgat*, for the appellee, G. W. Carper.

LACY, J., delivered the opinion of the court.

This was a suit brought by the administratrix of John G. Rudesill, deceased, in July, 1873, to settle up the estate of the said decedent, and to have her dower assigned. In the progress of the suit, and the taking of the accounts ordered, it appeared that the said John G. Rudesill was bound for a debt of one Gaunt, upon which a judgment had been recovered against the said Gaunt and Rudesill, and Rufus Pitzer and H. W. Camper, other sureties, in March, 1861, for \$658.53. with interest from January 1, 1861, and \$10.23 costs.

This suit was instituted by the said plaintiff against the heirs and certain creditors of the said John G. Rudesill. Dower was assigned, and an account of debts taken, which showed the debts, and among them the said judgment. In the original bill neither Gaunt, Pitzer nor Camper were made parties. In a decree entered October, 1879, it was suggested that the estate of Gaunt, the principal debtor, should be first exhausted before the estate of Rudesill should be taken or that of the other securities, and that new parties were needed to that end, and leave was given the plaintiff to amend her bill. And in the meantime the lands of Rudesill having been sold, and the

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money being in the hands of the court's receiver, it was ordered that the amount of the entire judgment should be paid to the judgment creditor, George W. Carper, who was directed to execute and did execute a refunding bond.

In 1868 the said Pitzer sold his lands in that county to Jacob Cronise, the appellant, who paid the entire purchase money to Pitzer. No amended bill was ever filed, and no summons was ever issued against Pitzer. A summons was issued and executed on Cronise and Camper, neither of whom were named in the bill. And at the return day of the summons the entry on the clerk's process book shows that the amended bill was dismissed by order of the plaintiff's attorney.

By decree of October, 1882, an account was ordered of the debts, and the commissioner gave notice to Cronise, but did not give notice to Pitzer, of the taking of the account.

The said commissioner in his report, among other things, stated that Rufus Pitzer sold his lands in said county on which the said judgment was a lien, to Cronise, who had some years before the date of his report, paid the entire purchase money over to Pitzer, and that said Carper, having his attention called to the matter by counsel for Cronise, acquiesced in the payment of the money over to Pitzer, on the ground that he had lost his claim on the Pitzer land by reason of the imperfect indexing of the judgment as to Pitzer. And the commissioner made alternate statements, one charging Cronise with the debt, principal and interest, \$616.01; the other not charging him at all. He also stated that Carper, the creditor, had lost his claim for any part of the debt against Camper by going into the pending suit settling up that estate, and waiving his senior lien against Camper, the one in question, and collecting a junior lien against the said Camper, whose estate was finally distributed and wound up.

The circuit court decreed against the said Cronise \$616.01, according to the alternate statement so charging him, and con-

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firmed the commissioner's report so far as it exonerated Camper's estate as to one-third of the debt, and Carper was held to have lost all remedy as to his one-third.

From this decree Cronise appealed; and the appellee, Carper, assigns as error the exoneration of Camper's estate as to the one-third, under rule IX of this court.

The appellant assigns as error in the decree of the circuit court, that he had never been made a party to the suit; that no complaint had ever been made against him in any of the proceedings, and that he had thus had no opportunity to answer, and that he could not be made a party by being summoned to answer before a commissioner.

In *Moseley v. Cocke*, 7 Leigh, 226, this court said of the appellant in that case: "No person has a right to file an answer in any suit in which he was not a party. The question then is was he a party here or not? It cannot be fairly questioned that the *subpoena* and conditional decree were both served upon him. But he is not named in the bill; there is no allegation anywhere in it which bears upon, or in any manner refers to him; nor is any decree prayed against him, either in terms or otherwise. It is a distinct charge against other persons, etc. He is, therefore, not a defendant. No process is prayed against him by the bill, and therefore, according to the authorities, he is not a defendant; and there being no charge against him, and no decree prayed, he had nothing to defend.

"The bill, it was true, was taken for confessed against him. But as it charged nothing, nothing was confessed, and therefore nothing could be decreed. In short, a decree against one not named in the bill, and nowise comprehended in its general allegations, is a nullity. He is not bound by it, and has therefore no necessity to contest it or to answer it."

In *Henderson v. Henderson*, 9 Gratt. 396, this court said: "The circuit superior court should have rendered no decree in the case until it had caused persons holding titles to the lands sought to be charged, to be made parties to the suit. * * * *

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The decree in regard to the land would be wholly inoperative against those who held the titles, but who are not parties to the suit."

In *Taylor v. Spindle*, 2 Gratt. 44, this court reversed the decree, because the holders of the legal title were not before the court, and it was held that such a course would be pursued even though the objections were not made in the court below.

These authorities, and there are many others, are conclusive of this case.

As has been said, not only was the appellant not made a party in any proper or competent way, but the debtor was not made a party, nor was he mentioned, nor named in any way, first or last, except in the judgment. But a personal decree, an order to pay Pitzer's debt to the commissioner, was entered against Cronise. Upon what principle could Cronise be decreed to pay this debt? It was not his undertaking, first, last, or at any time. If it was a lien on Pitzer's land, sold to Cronise, and had not been paid, it was a lien on the land in the hands of Cronise, and the land might be subjected to its payment; but how could this be judicially ascertained until Pitzer had been brought before the court as a party? He was entitled to a day in court before a decree could go against his land, and so in like manner was Cronise, the appellant. It follows that the decree must be reversed, for error, as to Cronise.

As to the error suggested by the appellee, there is nothing in this record to enable this court to pass on that question; the circumstances relied on by the circuit court not being brought before this court on this appeal by the appellant, nor by any other person.

The decree of the circuit court complained of is erroneous, and must be reversed.

DECREE REVERSED.

Syllabus.

Stannton.

HADEN v. FARMERS & MECHANICS FIRE ASSOCIATION.

SEPTEMBER 24TH, 1885.

LEWIS, P., absent.

1. **INSURANCE—*Specific performance—Bill.***—Equity will enforce performance of a contract of insurance made with an agent having authority to issue policies or to bind the company to issue policies, in favor of one who has paid the premium. *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362. But the bill must on its face distinctly state that such contract was made, and show when, where, how and by whom it was made, and that the person making it had authority to bind the company. *Haskins v. Ag. F. Ins. Co.*, 78 Va. 700.
2. **IDEM—*Agents—Powers.***—Insurance company may empower its agents to make contracts of insurance, or may limit their authority to soliciting applications, which are to be forwarded to its board of directors, who alone may be authorized by its constitution and by-laws to make such contracts.
3. **IDEM—*Charter and by-laws—Notice.***—Persons dealing with a corporation are affected with notice of the provisions of its charter, constitution and by-laws. *Rolfe v. Rundle*, 13 Otto, 222.
4. **IDEM—*Contract—Agent to solicit.***—An agent whose powers are limited by the charter, constitution or by-laws of the company, to receiving and forwarding applications for insurance, together with the premiums, to the company for acceptance or rejection, can make no contract of insurance binding the company.
5. **MISREPRESENTATIONS—*Title—Encumbrance.***—Any *material* misrepresentation will avoid a policy. But such is not the effect where the misrepresentation, if any, was simply technical, and unintentional and immaterial withal.

Statement.

Appeal from decrees of circuit court of Botetourt county, rendered September 2nd and October 25th, 1884, respectively, in the chancery cause wherein Richard G. Haden was complainant, and the Farmers and Mechanics Benevolent Fire Association, of Roanoke and Botetourt counties, was the defendant. In his bill the complainant claimed that the agent of the defendant corporation had, on 19th September, insured his dwelling-house and furniture therein for \$1400, and that he had then and there paid the required premium to said agent, but that before the policy had been issued, to-wit, on 1st November, 1883, the said house and furniture was consumed by fire; and that he was entitled to recover that sum of the defendant corporation. The defendant demurred to the bill, and answered it, setting up that the said agent had no authority to make the alleged contract of insurance; that if he had such authority, the fact was that he only solicited and received the complainant's written application to the defendant to insure said property; and that if the said agent had such authority and did make the alleged contract, it was void, because in said written application the complainant falsely represented that his title to said house was fee-simple and that it was unencumbered. The circuit court overruled the demurrer, and adjudged that the said agent did have authority to make, and did make said contract of insurance; but that the said contract was void as to the said house, which was insured for \$1200, on account of misrepresentations made by the complainant as to said title and encumbrance. From this decree the complainant obtained an appeal to this court; and the defendant corporation also asked that the said decree be reviewed and reversed for errors therein whereby it was aggrieved.

Opinion states the other facts.

Haden & Haden, for the appellant.

The court below erred in adjudging that the insurance con-

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tract made by the appellee's agent, was avoided by the false representations alleged to have been made by the appellant in his written application for insurance, as to his title to his house, and as to its freedom from encumbrance. If any such misrepresentations was made, it was unintentional and immaterial. The appellant's house was on a tract of nearly 400 acres of land, the fee simple value whereof was estimated at \$5750. In this tract the appellant had a life estate, which was estimated to be worth \$4372.87. But his sister, Mrs. Hood, shared with him the remainder, to the extent of the estimated sum of only \$351. Under these circumstances, the appellant had been professionally advised and actually thought he had a fee simple unencumbered title, but knew and told said agent that there was a law suit pending which cast a cloud upon his title. *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575; *S. M. F. Ins. Co. v. Yates*, 28 Gratt. 585; *M. F. Ins. Co. v. Weill & Ullman*, Id. 389.

Counsel for appellee insist that this agent had no authority to bind the appellee.

The appellee being a corporation can only act through its agents. An insurance company cannot hold out a person as its agent and then disavow responsibility for his acts. *Ins. Co. v. McCain*, 96 U. S. 84. An agent for an insurance company, authorized to act in its business at a distance from the principal office, has power to bind the company by parol as well as by written contracts. 2 Abbott's National Dig. 794; *Bauble v. Aetna Ins. Co.*, 2 Dillon, 156. And such companies are responsible for the acts of such agent within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals which are not brought to their knowledge. 2 Abbott's Dig. 769; *Bossell v. American Fire Ins. Co.* 2 Hughes (4th circuit), 531. The policy was not issued before the house and furniture were consumed by fire on the 1st November, 1883, because the appellee's agent delayed to forward the application. That agent had assumed the duty of forwarding the application, and it was his fault that

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it was not forwarded; and the neglect and fault of the agent is the company's neglect and fault, and the company is liable therefor, and should not be allowed to take advantage of its own wrong, and to defeat a just recovery. *Woody v. Old Dominion Ins. Co.* 31 Gratt. on page 377.

G. W. & L. C. Hansbrough, for the appellee.

Appellee maintains that the decree of the court below is free from error, in so far as it avoids the alleged contract of insurance as to the house, on the ground that the appellant made material misrepresentations as to his title thereto, and its freedom from incumbrance. He stated in his written application that his title was fee simple. It is admitted he had only a life estate in the house and land, and shared the remainder with another. It is said his share in the remainder was much larger than his sister's; was two-thirds, whilst hers was but one. It was either a defect in title or it was an incumbrance. It was material. The materiality of a misrepresentation does not depend on the amount involved, but in its nature; that is, as respects title or incumbrance. "A misrepresentation of title, in the application to a mutual insurance company, avoids the policy." *Merrill v. F. & M. Mut. Fire Ins. Co.* 48 Maine Rep. 285; *Allen v. Mut. F. Ins. Co.* 2 Md. 111. "Any material misrepresentations will avoid a policy." * * * "By asking the question, it would be manifest the company deemed the information material, and it would be material that the applicant should answer it truly." *Flanders on Ins.* 361, and 306-7.

But the appellee insists that the said decree is erroneous, in so far, 1, as it overruled the demurrer to the bill. The bill should have stated distinctly, not only the contract of insurance, but when, where, how and by whom, and under what authority it was made. This is elementary. The bill here was plainly defective in those respects. It did not distinctly charge that the said agent had authority to make such contract, but

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chiefly complained of the delay and negligence of the agent. It did not say whether the contract was parol or written, and left it in doubt whether it was contended that the application was itself the contract of insurance, or whether the contract was something else and outside. *Woody v. O. D. Ins. Co.* 31 Gratt. 362; *Haskins v. Ag. F. Ins. Co.* 78 Va. 700.

2. It also erred, in so far as it held that the said agent had authority to bind the appellee by contracts of insurance. The constitution and by-laws are specific in directing that only the board of directors, by its executive committee, can admit new members into the association, and issue policies of insurance. The said agent, and all other agents of the appellee, carried around, not blank policies ready to be filled up and delivered to persons insured, as was the case with the agent, Renzie, in the case of *Woody v. O. D. Ins. Co.*, *supra*, but only blank applications, to be filled up and signed by the person desiring to be insured, and to be forwarded with the premium to the board of directors, who had to approve the application and issue the policy, or reject it and return it and the premium. "Every person dealing with a corporation is bound to take notice of its charter, by-laws and ways of doing business." *Bockover v. Life Asso. of A.* 77 Va. 91; *Rolfe v. Rundle*, 13 Otto, 222.

Woody's case is no precedent for that of the appellant. The agent of the Old Dominion Insurance Company agreed to issue a policy to Woody, and received his premiums. That agent had authority to issue the policy. The house was consumed by fire before he issued it. This court held the company liable to pay the amount of the insurance.

The agent of the appellee agreed to forward the appellant's application for a contract of insurance. The agent, Kyle, neglected to forward it until the house was burned. Kyle was culpable for negligence certainly; and the appellee might possibly be held responsible in damages for its agent's conduct. But a contract of insurance is essential as support for this suit for specific performance. There was no contract here. Negli-

gence cannot make a contract of insurance. Nor can delay make one. *Winnesheik Ins. Co. v. Holzgraff*, 33 Ill. 516. Says *Lary J.*, in *Hoskins v. Ag. F. Ins. Co.*, *supra*:—"The fact that an application has been made for insurance and a long time has elapsed and the rejection of the risk has not been signified, does not warrant a presumption of its acceptance. In such cases there must be an *actual acceptance* or there is *no contract*."

3. Kyle made no contract of insurance with appellant. He only said to him his property would be insured if the executive committee approved his application. He predicted that it would be approved.

We submit that the decree complained of should be reversed in favor of the appellee, and the appellant's bill be dismissed.

FAUNTLEROY, J., delivered the opinion of the court.

On the 19th of September, 1883, the appellee, a corporation created under the laws of Virginia, sent its agent, one R. P. Kyle, to the house of the appellant, in the county of Botetourt, to solicit an insurance of the said house and of the furniture and household property therein. The said agent examined the house and household furniture, and valued the dwelling-house at \$1800, and the furniture at \$300; and fixed the insurable value of the former at \$1200, and of the latter at \$200; making the total insurable value \$1400; and estimated the amount of premium and charges for such insurance to be six dollars, which the appellant then and there paid to the said agent, who was one of numerous agents of the said association in the counties of Roanoke and Botetourt, whose power and duty was to solicit applications for membership, by insuring in said association, by filling up the blanks in a printed form of application, to be signed by the applicant, and to be forwarded with the premium paid for the proposed risk, to the secretary of the association, upon the express condition and understanding that the application had to go before the board of directors or ex-

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ecutive committee of the said association, to be passed upon and approved by them before the secretary could issue a policy of insurance and complete the contract of insurance. The application, in printed form, was filled up by Kyle with the answers of the appellant, and was signed by the latter, and delivered to Kyle, together with the premium, six dollars, to be sent to the secretary of the association. If it should be approved, then the secretary would issue a policy of insurance on it: if it should be rejected, it was to be returned, together with the premium, to the appellant. Kyle retained the application until November 3, 1883, when he forwarded it to the secretary at his office at Cloverdale, in Botetourt county, with information that the dwelling-house and furniture had been consumed by fire on the 1st November, 1883. The secretary referred the application to the executive committee, which did not approve it, the property having been destroyed by fire, but referred it to the whole board of directors, who disapproved and rejected it, and returned it, together with the premium, to Kyle, who tendered them to appellant, who refused to receive or accept either, and made a formal demand upon the appellee for the amount of the alleged insurance, which being refused, the appellant filed his bill in the circuit court of Botetourt county for specific performance of the alleged contract of insurance, and for general relief.

The defendant demurred and answered, averring that Kyle made no contract to insure the complainant's house and furniture; that he had no authority, as their agent, to make such contract; and that if he did make such contract, and was authorized so to do, the contract was null as to the said house, because the complainant, in his application, had represented his title to be *fee simple*, whereas it was only an estate for his own life. The court overruled the demurrer, and adjudged the complainant entitled to recover the value of the furniture, but that he was not entitled to recover anything for the house, because the contract of insurance was null as to the house, by

reason of complainant's misrepresentation of his title. In October, 1884, the appellant filed his "petition for review and rehearing" of the said decree for alleged errors on its face. To this petition the appellee demurred and answered, and the court sustained the demurrer and affirmed the said decree. From these two decrees the appeal was taken.

The error assigned by the appellant is, that the circuit court erred in decreeing that the contract of insurance was null and void as to the dwelling-house, because the appellant had misrepresented his title to said house as *fee simple*, when it was only a life estate. On the other hand, the appellee asks this court to consider the whole record under the IXth Rule, and reverse the decree of September 2, 1884, for error against the appellee, and amend the said decree so as to make it as the circuit court should have entered it.

The appellee is a corporation created by an act of the general assembly of Virginia, passed April 2, 1873, and amended April 7, 1882, with power to insure its members against loss by fire, and to pay the same by assessments upon its members. It is of the plan denominated mutual; and, as its name imports, it is a local association, purely and solely for benevolent purposes—organized for self-protection *of its members only*. By its charter it is authorized to make ordinances, by-laws and regulations for the government of all under its authority, and for the management of its business; and it has done so. Its rules as to receiving members and taking risks are strict, and its agents are limited to the mere and narrow authority of receiving applications and premiums for membership and forwarding the printed forms of application filled up by the proposals of the applicant and signed by the applicant, together with the premium, for the action of the board of directors, who, by the sixth section of their constitution, has the sole and exclusive power to receive members by approving, in their discretion, applications for insurance and to issue policies; which duty the said board of directors usually discharge through its

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executive committee. Its officers consist of a president, vice-president, secretary and treasurer, and so many directors as its by-laws may provide for. It is, and has been, the rule and practice of the association that no insurance shall ever be made except by a policy issued upon an application duly made, in its printed form, with the blanks filled up with the proposals of the applicant, signed by the applicant, and presented to the board of directors for their approval, or rejection, commonly acting through their executive committee.

Kyle was, on the 19th day of September, 1883, an agent of the association, with power only to take the formal application of the appellant, which does not purport to be a contract, but only his *proposal* for a contract of insurance, and to forward it to the board of directors, through their secretary, for their approval or rejection; he had no power to bind the association. And the appellant, in dealing with the said association, through him, was bound to take notice of its charter, constitution and by-laws. *Bockover v. Life Association of America*, 77 Va. (2 Hansbrough) 91, quoting from *Rolfe v. Rundle*, 13 Otto, 222.

This court, in *Woody v. Old Dominion Insurance Co.* 31 Gratt. 371, says: "The courts of Massachusetts give the greatest effect to the by-laws of a mutual insurance company in restricting the powers of its officers."

We think the circuit court erred in holding that the appellant had misrepresented his title to the property sought to be insured;—either by his answer to the 9th question—"What is your title to, or interest in the property to be insured?" viz: "Fee simple;" or by his answer to the 10th question—"Is your property encumbered?" viz: "None." The appellant undoubtedly acted in the most perfect good faith, and his interest in the house to be insured was substantial and exclusive against any and all others for his life; and his contingent or reversionary interest might, at any time, have become a fee simple interest; while the only encumbrance was a claim of his sister, Mrs. Hood, to a reversionary interest in the land, which was in-

significant and unimportant in proportion to the value of the whole land, exclusive of the house. Such as it was, however, technically the record shows that he stated the facts to the agent, Kyle, who filled up the blanks with his answers, "Fee Simple" and "None." The misrepresentation, if any, was simply technical and unintentional; and was immaterial, withal. "Any *material* misrepresentation will avoid a policy." Flanders on Insurance, 361.

We are of opinion that the circuit court erred in overruling the demurrer to the bill, the ground of which was want of jurisdiction in the court of equity to entertain the case set out by the bill. A court of equity has jurisdiction to enforce specific performance of a contract of insurance made with the agent of an insurance company, having authority to issue policies or to make binding contracts for said company to issue a policy, and the premium has been paid; but where, before the policy has been issued, or the application has been referred to, and considered and approved by the only authority in the association, which, by its charter, constitution and by-laws, can make a complete and binding contract of insurance for the company or association, the property proposed to be insured is consumed by fire, there can be no complete contract which a court of equity can enforce. *Woody v. Old Dominion Insurance Co.*, 31 Gratt. 362; *Haskins v. Ag. Fire Insurance Co.*, 78 Va. (3 Hansbrough) 700. But the bill must, on its face, distinctly state that such contract was made, and show when, where, how, and by whom it was made, and that the person making it had the authority to bind the company. The bill says that on the 19th of September, 1883, at appellant's house, R. P. Kyle insured appellant's house and furniture, and received the premium therefor, six dollars, and that the property was destroyed by fire before the policy was issued; and that the appellee refused to issue a policy after the house and furniture were burned; and also refused to pay the appellant any part of the sums of money at which said property was alleged to have been insured by its

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agent, Kyle. But the bill does not state, distinctly or sufficiently, that the alleged contract was by parol or in writing; that it was by the taking of the application in writing, which was signed by the applicant, and not by the appellee, or its agent, and the payment of the premium, six dollars; or that it was by something outside of said application. The bill does show that the appellant was badly treated by the negligence of the appellee's agent in not sending on promptly and duly his formal application and proposal for insurance to the proper authorities of the association for their approval or rejection; but the negligence or tortious conduct of the defendant, or its agent, is not ground for jurisdiction in such a case as this in equity; the contract must be distinctly stated in the bill to protect it from a demurrer; and the contract must be proved, as stated in the bill; and, as stated and proved, it must be certain, fair and just, in all its parts, in order to support and maintain the bill, and to entitle the complainant to relief in equity. *Haskins v. Fire Insurance Co., supra*. Nor does the bill charge that Kyle, the agent, had the authority to bind the appellee by his contract so averred to have been made to insure said house and furniture; and the very idea and fact of a written application taken by an agent from an applicant desiring to have his property insured by the agent's principal, to be forwarded to that principal for approval or rejection, and making proposals for a contract of insurance by a policy yet to be issued or denied by that principal, is repugnant to the idea that a contract of insurance had already been made; that the formal application and terms proposed and submitted for a policy and contract of insurance, was a contract of insurance. The demurrer should, therefore, have been sustained. But, upon the evidence in the cause, the circuit court erred in decreeing that the appellant had established, by proof, such a contract of insurance with the appellee as entitled him to relief, in whole or in part; and that he recover of the appellee the value of the furniture alleged to have been insured, and which was destroyed by fire.

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In the case at bar, Kyle was an agent to solicit and receive applications and proposals for insurance, and to forward them, with the premiums, to his principal for acceptance or rejection. He was supplied only with printed forms of application for this end and purpose; and this was the extent of his agreement with the appellee. Negligence cannot make a contract of insurance; delay cannot make a contract of insurance. *Wimesheik Insurance Co. v. Holzgraff*, 53 Ill. 516.

In *Haskins v. Ag. Fire Insurance Co.* 78 Va. (3 Hansbrough) 700, Judge Lacy says, for this court: "The fact that an application has been made for insurance, and a long time has elapsed, and the rejection of the risk has not been signified, does not warrant a presumption of its acceptance. In such cases there must be *actual acceptance, or there is no contract.*" Without a contract of insurance, this suit for specific performance cannot be maintained here, whatever might be the remedy and relief in an action at law for damages for the negligence of Kyle. Kyle was not authorized to make contracts of insurance for the appellee; and the evidence does not show that he made one. He explains his declarations to the appellant that his property was insured; he says he told him that it *would be insured if the executive committee approved his application.* Doubtless, he thought and said that the executive committee would approve it; but such a prediction or declaration, made after appellant's signing the application and paying the premium, did not, and could not, constitute a contract of insurance.

The decree complained of is erroneous, and must be reversed, and the appellant's bill be dismissed.

HINTON, J., dissented.

DECREE REVERSED in favor of the appellee.

Staunton.

TERRY v. COLES' EX'OR AND ALS.

SEPTEMBER 24TH, 1885.

1. JUDICIAL SALES—*Definition—Case at bar.*—Sale made by order of a court of competent jurisdiction, *pendente lite*, is a judicial sale. An executor having authority under the will to sell land, declines to exercise his authority, but applies to the court for instructions and directions, and is ordered to make sale and report it to the court for confirmation; whereupon, he makes and reports the sale to the court as ordered, such sale is a judicial sale.
2. IDEM—*Bidders—Confirmation.*—Bidder acquires no rights until his bid is accepted and the sale confirmed by the court. Whether the sale will be confirmed depends on the circumstances of each case and the sound discretion of the court in view of fairness, prudence and the rights of all concerned. No general rules will apply to all the cases. *Brock v. Rice*, 27 Gratt. 812.
3. IDEM—*Rejection of Bid—Case at bar.*—Where sale of land is decreed to pay specific legacies, and the residue to four residuary legatees, and the land is bid in by one of those legatees, and the other legatees oppose the acceptance of the bid and the confirmation of the sale, and show by numerous witnesses well acquainted with the land, that though the sale was open and fair, yet the price bid was grossly inadequate, and that the land if divided and sold in parcels would, on the usual terms of payment in such cases, bring two or three times the price bid; there was no error in the court rejecting the bid, and refusing to confirm the sale and directing a re-sale.

Argued at Wytheville, but decided at Staunton.

Appeal from decree of circuit court of Roanoke county, rendered October 9th, 1884, in the chancery cause wherein Robert

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McClellan, executor of Elizabeth Coles, deceased, was plaintiff, and John Coles and others, the devisees and legatees of said Elizabeth Coles and others, were defendants. The object of the suit was to obtain the court's instructions and directions as to the proper mode of executing the trusts imposed on the executor by the will, and especially as to the sale of a tract of 4552 acres of land, part of the testatrix's estate. The court decreed that the executor sell the land in a certain way and on certain terms and report the sale to the court for confirmation. Executor made the sale for \$6000, to J. Coles Terry, one of the four residuary legatees to whom the proceeds of the sale were going after the payment of certain specific legacies. The other residuary legatees urged the rejection of the bid of \$6000. The sale was shown to be fair, but the price was proved to be grossly inadequate, numerous witnesses, who knew the land well, testifying that, if sold in suitable parcels, it would bring two or three times the price bid by J. Coles Terry. The court refused to confirm the sale, and decreed a re-sale in parcels. From this decree J. Coles Terry obtained an appeal to this court.

Opinion states the facts.

Carrington & Fitzhugh, for the appellant.

Penn & Coke and *Staples & Logan*, for the appellees.

LACY, J., delivered the opinion of the court.

In September, 1883, the appellee, the executor of Elizabeth D. Coles, deceased, instituted a chancery suit in the circuit court of Roanoke county, setting forth the death of his testatrix on the 9th day of June of that year; the probate of her will and his qualification thereunder, and filed a copy of the will. That, among other property, the testatrix was the owner of a tract of four thousand five hundred acres of land, which consisted in large part of mountain land. That there were

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numerous small settlements upon this land occupied by tenants. That he thought it might be to the interest of the estate to sell this land privately, rather than publicly, and he desired the instruction of the court as to his power to do so; that there were various trusts declared by the will, and some limitations on some of the legacies which are obscure in their terms, citing them as matter for the decision of the court, claiming that he was entitled to the protection of the court in the execution of the said will, and *to its* instruction as to his action therein. Praying that all parties in interest be made parties to the suit, and that the will of his testatrix be construed by the court, and especially as to the points set forth in the bill; that he might be *instructed on all points* as to his duties as executor; and that the estate be administered under the direction of the court, and for other relief, etc.

After some special legacies, the will provided as to the residue, that it should be equally divided among four residuary legatees; Mrs. Louisa P. Withers, Miss Lizzie D. Carrington, Mrs. Emma C. Middleton and John Coles Terry, the appellant; and appointed Robert McClelland, the appellee, executor, without bond with security.

The circuit court, by decree rendered on the 9th day of October, 1883, construed the will on all points, and decreed, that the executor, by the terms of the will, was authorized to sell the real estate publicly or privately, at his best discretion. That he should proceed to do so, and that he should report his proceedings to the court, and all sales made by him would be subject to the approval of the court. That the executor settle his transactions before one of the commissioners of the said court, who was directed to make report to court.

The infant defendants answered by guardian *ad litem*, and the bill was taken for confessed as to the adult defendants. On the 1st day of October, 1884, the appellee filed his report under the decree for a sale, setting forth that by directions contained

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in the will of the testatrix, and in obedience to the decree in the cause at the October term, 1883, he had on the 21st day of July, 1884, that being county-court day, after duly advertising the same, sold the tract containing four thousand five hundred acres to J. Coles Terry, one of the residuary legatees, at the price of six thousand dollars, who had paid one-fourth cash and otherwise complied with the terms of the sale. That the sale was open and fair, in the presence of a large crowd of people drawn together by court-day; that there were several bidders; that from his own judgment and the judgment of others he had thought it best to sell as a whole; that the amount realized (as he was at present advised) was more than sufficient to pay off the specific legacies, and the report was respectfully submitted to the court for its action.

The confirmation of this sale was objected to by Mrs. Louisa P. Withers, (through her counsel), who is stated in the will to be a resident of Danville, Va. The will also states that Miss Carrington and Mrs. Middleton reside in Richmond city, Va.; and that J. Coles Terry, the other residuary legatee, resides in Roanoke county, where the sale occurred, and he, as has been said, became the purchaser at the reported sale.

The objection of Mrs. Louisa P. Withers to the confirmation of the sale by the court, was upon the ground that "*the price was wholly inadequate.*" This objection to the confirmation was supported by the affidavit of John Coles, dated October 2nd, 1884, who made oath that he was well acquainted with the land, and that it was worth \$2.50 per acre, or \$11,250, if sold upon the usual terms of land sales in that county.

The affidavit of J. J. Huff, that he was well acquainted with the land, and if sold in parcels, and on the usual terms of land sales in that county, it was worth \$4 per acre, making \$18,000. This affidavit was on the same day.

The affidavit of P. H. Kefauver was that he knew the land well, and that upon the usual terms and in small tracts it was worth \$4 per acre, or \$18,000.

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The affidavit of J. H. Overfelt, on the same day, showed that he was, and had been for eleven years, a renter of this land; knew it well, and that it was worth \$4 per acre, or \$18,000.

The affidavit of N. Hockman, taken on the 1st day of October, showed that he was a coterminous owner; was well acquainted with the cleared land of the tract, and that there was said to be one thousand acres cleared and in cultivation, and that it was worth \$9 per acre; that he had sold some land adjoining this, belonging to him, of about the same quality, at \$10 per acre.

The affidavit of Col. Wm. B. Shelor, of October 2d, was that he was not well enough acquainted with the land to state its value, but that he believed that if divided up into small tracts it would sell for a *good deal more* than if sold as a whole.

The affidavit of Tazewell Price, of October 27, 1884, was that he was well acquainted with the land, and thought it worth \$4 or \$5 per acre, or \$18,000 to \$22,500.

The affidavit of Robert Huff, of the 2d of October, 1884, was that he knew the land well; that there were six hundred acres situted on Mill and Bottom Creeks worth *at least* \$10 per acre, which is \$6000, and would leave 3900 acres to be sold in small tracts; and if the land should be surveyed, and the lines run as claimed by Mr. Joseph Terry, the land would overrun the estimate by one thousand acres.

The affidavit of James E. Day, of October 1st, 1884, showed that he was well acquainted with the land, and that it is worth \$4 to \$5 per acre, or from \$18,000 to \$22,500, which opinion is based on *actual* sales in the neighborhood; that he is a surveyor, and believes the land could be conveniently divided into small tracts, and that it would sell more advantageously in that way.

And the affidavit of C. C. Miller, of October 4, 1884, that the rental value of the land is eleven hundred dollars per year, and that he bases his opinion on information derived from tenants on the land, and the actual rents paid by them, and from other sources of information in the neighborhood.

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On the 25th day of October, 1883, an appraisement was made of this land, under an order of the county court of Roanoke, entered at the August term of that court, 1883, which is filed also to support the objection of Mrs. Withers; wherein it is set forth by the four commissioners, who acted under the order of the county court, that after being sworn, they had made a *personal inspection* of the land, and appraised it at \$11,500. These were the appraisers named and appointed on the motion of Robert McClelland, at the time of his qualification as executor, to appraise the personal property of the testatrix, and the real estate directed to be sold.

On the other hand, in support of the insistence of the appellant, J. Coles Terry, that the sale shall be confirmed by the court, extracts from the land-books of Roanoke county are filed, showing that this land is valued on the land-books for taxation at \$4524.

The cause came on to be heard in the circuit court on the 9th day of the term, October, 1884, upon the motion to confirm the sale, and the objection of Mrs. Withers, and the affidavits and stated assessments. Whereupon the circuit court refused to confirm the sale to J. Coles Terry, and directed the land to be again offered for sale. The said J. Coles Terry, the appellant, then applied for an appeal, which was allowed by one of the judges of this court. The refusal of the circuit court to confirm this sale is assigned as error by the appellant; that the sole ground of the refusal of the circuit court to confirm the sale was inadequacy of price. The decree is assailed:

First. Because the sale was made by the executor under the will, and the exercise of this discretion by him was a contract between him and the purchaser. That if he had sold without the intervention of the court, it would have been a contract which would have been specifically performed; that it is well settled that inadequacy of price alone is not of itself a sufficient ground for setting aside a contract.—Citing *Hale v. Wilkinson*, 21 Gratt. 82, and *White v. McGannon*, 29 Gratt. 515.

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It is then claimed that the same general rule should prevail in judicial sales. That it is admitted that confirmation is addressed to the sound discretion of the court; but so, says the learned counsel for the appellant, is the question of specific performance of any contract, addressed to the sound discretion of the court, &c., &c.

As to the first question, whether this is a judicial sale, or a sale by the executor under authority of the will, we will remark, that while the executor was authorized to sell under the will, and was allowed to do so under the will, without giving security, he declined to do so, and indeed did not qualify as the will authorized without giving security upon his official bond, but was required to furnish security in the sum of twenty thousand dollars, with J. C. Terry and John Coles as his sureties. He came into court, and sought the aid and protection of the court on all points, declining to assume any responsibility as executor, asked the court to administer the estate, which the court proceeded to do, and directed him to offer the land for sale and make report to the court. Such a sale appears to be a judicial sale.

Mr. Bouvier defines a judicial sale to be a sale made by some competent tribunal, by an officer authorized by law for the purpose. Mr. Barton defines a judicial sale to be one which is made by a court of competent jurisdiction in a pending suit, through its authorized agent.

And this definition seems to be complete.

It must be made in a *pending suit*: says Mr. Rorer, "a judicial sale is made *pendente lite*; whereas an execution sale is made after litigation in the case is ended; for, as we have before seen, a judicial act is something done during the pendency of a suit. The suit does not end with a decree of sale; the proceeding still continues until final confirmation." Ror. Jud. Sales, § 18; also § 1. *Williamson v. Berry*, 8 How. 495.

In the light of all the authorities the sale in this case is what is called a "judicial sale." It was made by the court, through

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its agent or officer, in a pending suit, and the sale was by decree ordering the sale, expressly made to depend upon approval or confirmation by the court, and to that end it was directed to be reported to court, and the court is the vendor. The circuit court in this case has refused confirmation upon the case made before it; in the exercise of the discretion vested in it, has refused to confirm the sale, and the purchaser has appealed to this court to review and reverse the action of the court in refusing to sanction the sale to him.

The field which lies before us in the consideration of this question, has been so often explored, the road is so well defined, and the judicial sign-boards so numerous and so distinct, that the task is divested both of novelty and difficulty.

Mr. Barton says: "In Virginia, a bid by a purchaser to a commissioner, is a *bid to the court*, and if accepted he is bound by it, but the court and not the commissioner is the seller, and the confirmation by the court, and its direction to convey, are essential to the validity of *any sale* that the commissioner may make." Barton's Ch. P. 1070. And on page 1094: His bid at the commissioner's sale is a *mere offer*, and although after confirmation his title relates back to the day of sale, yet he has until confirmation to examine into the matter, and to enquire if there be any defects in the title. See, also, p. 1100, sec. 352.

But this question has been before this court and often considered. In the late case of *Langyher, trustee, v. Patterson & Bash*, Judge Fauntleroy says: "Confirmation is the judicial sanction of the court; and by confirmation the court makes it a sale of its own, and the purchaser is entitled to the full benefit of his contract, which is no longer *executory* but *executed*, and which will be enforced against him and *for him*." 77 Va. Rep. 473.

In the case of *Brock v. Rice*, 27 Gratt. 812, Judge Staples said: "In considering this case, it is important to bear in mind rules of law governing judicial sales. All the authorities agree there is a wide distinction between an application to set aside a sale after it is approved by the court, and an application to with-

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hold a confirmation. A decree of confirmation is a judgment of the court, which determines the rights of the parties. Such a decree possesses the same force and effect of any other adjudication by a court of competent jurisdiction. But before confirmation the whole proceeding is *in fieri*, and under the control of the court. *Until then the accepted bidder is not regarded as the purchaser.* His contract is incomplete, and he acquires by his bid no independent right to have it perfected." * * *

"It is very certain that with us the commissioner conducting a sale is regarded merely as the agent or servant of the court, and his proceedings are necessarily subject to its revision and control. Whether the court will confirm the sale must, in a great measure depend upon the circumstances of each particular case. It is difficult to lay down any rule applicable to all cases; nor is it possible to specify all the grounds which will justify the court in withholding its approval. This discretion is not arbitrary, but a sound legal discretion," &c. Citing *Taylor v. Cooper*, 10 Leigh, 327, opinion of Tucker, P. The sale is not conclusive until confirmed. *Davy v. Barber*, 2 Atk. 490; *Blount v. Blount*, 3 Atk. 638.

When the sale is confirmed, that is where *both contracting parties concur in ratifying* the inchoate purchase, the confirmation relates back to the sale, &c. *Anson v. Towgood*, 1 Jacobs & Walk. 617.

Before confirmation of the report, indeed, and while the cause is yet pending in a court of chancery, to that tribunal alone can the purchaser resort for the adjustment of his rights, and the enforcement of his claim. *Creeds v. Pendleton*, 1 Leigh, 297; *Heywood v. Covington's heirs*, 4 Leigh, 373; *Daniel v. Leitch*, 13 Gratt.

In *Brock v. Rice*, Judge Staples cites Rorer on Judicial Sales, pp. 30, 55, 56. On these pages, Mr. Rorer, in treating of the confirmation of the sale, says: "Confirmation is the judicial sanction of the court. Until then the bargain is incomplete (citing *Koehler v. Ball*, 2 Kan. 166, 172). Until confirmed by

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the court, the sale confers no rights. Until then it is a sale only in a popular and not in a judicial or legal sense. The chancellor has a broad discretion in the approval or disapproval of such sales. The accepted bidder acquires, by the acceptance of his bid, no independent right, as is the case of a purchaser at a sale under execution, to have his purchase completed, but is merely a preferred proposer, until confirmation by the court of the sale, as agreed to by its ministerial agent. In the exercise of this discretion a proper regard is had to the interest of the parties and the stability of judicial sales. By sanctioning a sale, the courts make it their own. There is a difference between such sales, and ordinary auction sales, and sales by private agreement. In cases of sales before a master, the purchaser is not considered as entitled to the benefit of his contract till the master's report of the purchaser's bidding is absolutely confirmed."

Such, says Mr. Rorer, is the rule, whether the sale be by a master commissioner, or other functionary authorized by the court to conduct the sale. The bargain is not ordinarily considered as complete until the sale is confirmed and the conveyance is made. 2 Daniel Ch. 1454; *Rawlings v. Bailey*, 15 Ill. 178; *Blossom v. R. R. Co.*, 3 Wall. 207; *Childress v. Rust*, 2 Swan (Tenn.) 487; *Valler v. Fleming*, 19 Mo. 454; *Webster v. Hill*, 3 Sneed (Tenn.) 333; *Henderson v. Herrod*, 23 Miss. (1 Cush) 434; *Young v. Keogh*, 11 Ill. 642; *Wallace v. Hale*, 19 Ala. 367.

In the case of *Davis v. Stewart*, 4 Texas Rep. 226, the court says: "It will be seen, much discretion is left to the judge: if he should believe that the sale was not fair, or that it was not made in conformity with law, it would be his duty to set it aside, and order it to be sold again. He is not required to place upon the record the reasons by which he is governed, either in confirming or rejecting a sale. The purchaser could not be injured; when he bid for the land he was aware that he was purchasing subject to the confirmation or rejection of the sale by the probate judge; and if he wished to do so, he could

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be again a bidder at the second sale. If the decision of the judge on the question of confirmation is *subject to revision at all*, this is clearly not a case that would call for the interposition of a higher tribunal." 4 Texas, 226.

In the case of *Henderson v. Herrod*, the high court of errors and appeals of Mississippi, says: "Prior to the confirmation, the whole subject matter is *in fieri* and under the control of the court, subject to the exercise of a sound discretion in regard to it." 10 Miss. Rep. 454.

In the case of *Taylor v. Gilpin*, the court of appeals of Kentucky reaffirms an often repeated rule of that court, the court in that case saying: "The application to the chancellor was not to disturb a sale which he had approved, but it was to reject a bid or proposal which had been offered. This court has time and again held that a purchaser of property, under a decretal sale, does not acquire any independent right by his purchase *until* after the same has been approved by the chancellor. He is simply an accepted or preferred bidder; and whether his bid or proposal will be approved, depends upon the sound, equitable discretion of the court having control of the cause." 3 Met. 546. See also 3 Dana 614; 2 B. Mon. 410; 5 B. Mon. 494.

This is a proceeding, it will be remembered, not to sell this land to pay any creditor a debt which had been long delayed in collection, nor to satisfy any lien of any creditor; but it is a sale to convert the devised land into money, to satisfy the several bequests under the will of the testatrix in their order, to pay off the special legacies, and for distribution of the residue among the residuary legatees, and is a proceeding analogous to the sale of land made under proceedings for partition, or sale and distribution among the heirs of a decedent, where it would appear to be the first duty of the court in the premises to so sell the land as to make it bring as much as possible.

In the matter of the sale of the real estate of Hamilton's estate, reported in the 51st volume of Pennsylvania State Reports,
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entitled "*Hay's Appeal*," p. 59, Justice Strong, delivering the opinion of the supreme court of that state, said: "This appeal is founded upon a misapprehension of the relations between the parties. Heirs of a decedent, when parties to a proceeding for partition, stand in no relation of trust or confidence to the bidders at the sale; and even the highest bidder, whose bid has been returned to the court as the best offered, has acquired no right which debar the heirs or their counsel from endeavoring to have his bid rejected and a re-sale ordered. It is their right to have as much obtained for the property as can be, and until a sale has been made and confirmed, they may seek for purchasers who are willing to give more for the property than was offered at public auction. They may ask the court to open the biddings, to order a new exposure of the property to auction. This is no wrong to the person who bid most at the former auction. His bid, though the highest, was but an offer to purchase, subject to the approval or disapproval of the court, and in approving sales made in partition, it is the duty of the court to regard primarily the interest of the heirs. The appellant, then, in this case has no reason to complain.

Again, it is insisted that it was irregular to set aside the sale to the appellant without notice to him. This assumes that he had an interest in the land when his bid had been returned as the highest. This may be doubted. It is enough to say that the appellant's bid was but an offer to the court, which the court might or might not accept at its discretion. *He stood in the situation of a bidder at a master's sale in chancery. It is by no means certain that he had anything to do with the question upon which the court acted.* When the confirmation was resisted, for the reasons that the bid was less than the appraised value of the land, and that another exposure to sale would result in securing a larger price, it is not clear that the court should have directed any notice to him. The appeal is dismissed," &c. 51 Penn. St. Rep. 61.

In the supreme court of Ohio, in the case of the *Ohio Life*

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Insurance and Trust Co. v. Gibbon and others, reported in 10 Ohio St. Rep. 563, Judge Peck, delivering the opinion of that court, in which all the other judges concurred, said: "The power to confirm or set aside, if properly exercised, will afford ample protection to the parties and to the purchaser, and there, in our judgment, *this summary* power of the court over the matter should terminate." If, from misapprehension or other cause, the sale ought not to be confirmed or made, the *best and only proper remedy is a re-sale*, with or without a revaluation, as justice may require.

It cannot be necessary to multiply decisions upon this question, which, although of the greatest importance, has been so often considered by the courts of last resort in this and other states, as to make the chief difficulty in citation of authorities one of selection merely, and the cases are all one way. In all the numerous cases we have examined, in the wide search we have not found an adverse decision; not one has been cited in argument by the able and distinguished counsel who argued this case for the appellant. We have found no case, and it is believed that none can be cited, in which an appellate court has decreed that a contract had been made by the purchaser with the court, before the sale had been confirmed by the court, or his bill accepted by the court as the vendor, and reviewed and reversed the action of the court below in its exercise of this its wide discretion as the vendor, to reject any bid; that this discretion is a wide discretion cannot be denied in the face of the decided cases.

One respectable authority goes so far as to declare that the court is clothed with an *unlimited discretion* to confirm a judicial sale, or not, as may seem wise and just. Confirmation is final consent; and the court being the vendor, it may consent or not, at its discretion. Rorer on Judicial Sales, p. 56, cited by Judge Staples in *Brock v. Rice*.

We might well rest our decision in this case here, and dismiss this appeal. But a slight examination will show, upon an

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inspection of the record, that this sound legal discretion of the circuit court was wisely exercised in this case. By whom is this confirmation recommended? By no party or witness in the record except the purchaser. The agent, or servant of the court, the executor appointed to sell under the decree of the court, does not recommend to the court the confirmation. He says the amount realized will be more than enough to pay off the special legacies, and he submits his report to the court for its action. This commissioner does not even say to the court that the land sold for a fair and an adequate price. He says it was an open and fair sale, but he does not say that the price was reasonable. The purchaser himself does not assert that he has paid a reasonable price for the land; he says, that the fact that he has a good bargain, is no reason for *setting aside the sale*. He claims upon the ground of a completed contract.

If the court was to wisely exercise its sound legal discretion in the premises, it must do so *upon the evidence before it*.

How was the objection to confirmation supported? Four appraisers appointed by the court in which this executor qualified, upon a personal examination of the lands, and upon oath, valued it at nearly double the amount bid for it by the appellant. Ten unimpeached citizens of the county living in the immediate vicinity of this land, some of them coterminous owners, and some of them actually living upon this land as tenants, and all well acquainted with the land, upon oath say, that this land is worth, some of them, double, some of them, three times the price at which it was bid in by the appellant. And some of them say that the annual rental of this land is eleven hundred dollars, while the bid of this appellant was \$6000.

These affidavits, gotten up in the short time allowed, the report being filed only in term, are treated very lightly by the learned counsel for the appellant. It is argued that they are easily obtained, etc. If so, why not find some one in the large crowd drawn together by court-day, to contradict the very important statements contained in them; and if it so happened

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that the evidence was obtainable, but not conveniently at hand, why not produce it before the court in some form? It must have been upon the idea that the court had no discretion in the premises, however great the inadequacy of the price offered.

But, as we have seen, the court was bound to exercise a sound legal discretion in accepting this bid or rejecting it, and a fundamental consideration with the court was obliged to be as to a sufficiency of the amount offered; and this discretion should be exercised upon evidence adduced before it.

It is not remarkable that a court should refuse to confirm a sale, when no person, not even the commissioner reporting it, could be found to say the price offered was adequate. The purchaser was one of the residuary legatees; he was entitled to one-fourth of the residuum; if the sale was confirmed to him, he lost all interest under the will. Yet he insists that his bid shall be accepted; he regards the advantage he has obtained over the other residuary legatees as greater than his interest under the will.

It was the duty of the court, in administering this estate, to have a due and just regard to the rights of all parties in interest, and to sell the land for the best price obtainable. There was no error in the decree complained of, and the same must be affirmed.

DECREE AFFIRMED.

Staunton.

CORNETT v. RHUDY.

SEPTEMBER 24TH, 1885.

1. PRESUMPTIONS—*Hereditaments*.—In principle there is no difference as to the acquisition of rights, whether the subject be corporeal or incorporeal; but the statute of limitations introduces a difference.
2. IDEM—*Corporeal hereditaments—Statute of limitations*.—As to the possession requisite to acquire title to things corporeal, the statutory period prevails.
3. IDEM—*Incorporeal hereditaments—Prescription*.—Twenty years adverse, exclusive, undisturbed possession of things incorporeal, affords conclusive presumption of title.
One is entitled to the benefit of all water on his lands, but another may acquire a right thereto by twenty years adverse, exclusive and undisturbed occupation thereof.
4. PRACTICE AT COMMON LAW—*Province of jury*.—It is fundamental that, where the evidence is parol, any opinion given by the court as to the weight, effect or sufficiency of the evidence submitted to the jury, or any assumption of a fact as proved, is an invasion of the province of the jury, and is reversible error.

Error to judgment of circuit court of Grayson county, rendered on the — day of September, 1883, in an action of trespass on the case, wherein the appellant Cornett was plaintiff, and the appellee Rhudy and als. were defendants.

This case was argued at Wytheville, but decided at Staunton. The case is fully stated in the opinion of Judge Lacy.

Robert Crockett, for plaintiff in error.

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W. H. Bolling, W. R. Terry and Dickenson, for defendants.

LACY, J., delivered the opinion of the court.

The plaintiff in error instituted his action of trespass on the case for damages to his lands, caused by the mill-dam of the defendants in error backing the water, and flooding the lands of the plaintiff in error. The declaration sets forth that the defendants in error, on the first day of January, 1879, raised their dam, and flooded the lands of the said plaintiff in error, and on other days, from that time to the institution of the suit, on the 25th day of February, 1879, had caused damage to the plaintiff, &c.

The defendants filed three pleas, not guilty. Not guilty in five years, and that the plaintiff was not the owner of the fee in the land upon which he charged the damages to have been committed; to which the plaintiff objected, which objection was overruled by the court. Subsequently three other pleas were filed without objection. One setting up a right to flood the lands of the plaintiff by prescription. The fifth is of a prescriptive right for ten years; and the sixth is of a title by ancient deed. The plaintiff replied generally to these pleas. At the trial the plaintiff asked for four instructions. The court gave three, and refused the third instruction asked for by the plaintiff. The defendants asked for five instructions, all of which the court gave. And the plaintiff excepted to the ruling of the court rejecting his third instruction and giving the five instructions asked for by the defendants; and his bill of exceptions, setting forth the evidence and the instructions objected to, was duly signed and recorded.

The third instruction of the plaintiff, rejected by the court, is as follows:

"The jury are also instructed, that ten years, the period by the statute limiting the time when any person shall make an entry on or bring an action to recover any land lying west

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of the Alleghany mountains, where the same in question is situated, does not apply to this action."

The fourth and fifth instructions given by the court, upon the motion of the defendants, are in effect the converse of the third instruction asked for by the plaintiff and refused by the court, to which is added, in the fourth instruction, that in the assessment of damages they are limited in their enquiry to the period set forth in the plaintiff's declaration, as stated above.

The first question upon which we are called to pass, is the question raised by the rejection of the plaintiff's third instruction, and giving to the jury instructions embodying the converse of the proposition therein contained, numbered four and five of the defendant's instructions. That is, that the presumption of the grant of an easement, giving the right to pen back water upon the lands of another, may arise, and the right may be acquired, by user and enjoyment adverse and exclusive in its nature, of the said easement, for the same period of time which would under the statute of limitations raise such presumption as to, and acquire title by possession, to real estate, held during the time and in the manner fixed by law.

The uninterrupted enjoyment of an incorporeal hereditament, for a period beyond the memory of man, is held to furnish a conclusive presumption of a prior grant of that which has been so enjoyed. If this enjoyment has been not only uninterrupted, but exclusive and adverse in its character for the period of *twenty years*, this has been held at common law as a conclusive presumption of title.

There is no difference *in principle* whether the subject be a corporeal or an incorporeal hereditament: a grant of land may be as well presumed as the grant of a fishery, or a common, or a way.

But, in regard to the effect of possession alone for a period of time, unaccompanied by other evidence, as affording presumption of title, a *difference* is introduced by reason of the *statute of limitations*, between *corporeal subjects*, such as lands and tene-

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ments, and *things incorporeal*; and it has been held, that a grant of lands, conferring an entire title, cannot be presumed from mere possession alone for any length of time short of that prescribed by the statute of limitations. The reason is, that, with regard to *corporeal hereditaments*, the statute has made all the provisions which the law deems necessary for quieting possessions, and has thereby *taken these cases out of the operation of the common law*. Greenleaf Ev. v. 1. Judge Lomax says, upon this subject: "There is besides, a species of common law prescription, which affects incorporeal rights, profits and easements, such as commons, ways, water courses, viz: *twenty years* undisturbed enjoyment, which is considered as affording at least *prima facie* evidence of a prescription, or customary right. So of the use of a water course, or of the use of ancient lights; these may be inferred from *twenty years* exercise of such rights." 2 Lom. Dig. 786.

And while the same high authority asserts, that in Virginia there can be no right claimed by immemorial prescription, according to the doctrines of the English law, still, as we have seen, he recognizes and defines the common law prescription of *twenty years as affecting incorporeal rights*.

Judge Tucker says, in his Commentaries, "The 17th chapter of Mr. Blackstone's 2nd book being devoted to title by prescription, I shall content myself with merely referring the student to it for his perusal. For we must remember, as every prescription is *founded solely* on immemorial enjoyment, and as the comparatively recent settlement of the American colonies excludes the idea of such immemorial use, we can have no right by prescription in Virginia: a position in which there seems to be an universal acquiescence among the profession with us." Book 2, 211, T. C.

Mr. Minor, referring to this idea, and citing Littleton and Coke, says the authorities irresistibly show that *there may be a title by prescription in Virginia*, where the possession has been

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honest, uninterrupted, adverse and immemorial; and they show, moreover, that a continuance of possession for more than twenty years, if the other circumstances exist, is conclusive proof of immemorial enjoyment. Minor's Inst. p. 494, B. 2.

In the case of *Coalter v. Hunter*, 4 Rand. 58, Judge Cabell, delivering the opinion of this court, cited Lord Ellenborough as saying, in *Beaty v. Shaw*, 6 East. 208, that, "twenty years exclusive enjoyment of water in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived either from grant or act of parliament;" and says that this doctrine, understood as Lord Ellenborough intended to apply it, is perfectly correct; and that the law on subjects of this kind, is well laid down in *Campbell v. Willcox*, 3 East. 294, where it was held, "that if the jury were satisfied that the enjoyment of the way was adverse, and that it had continued upwards of twenty years, it was sufficient ground for presuming a grant." 4 Rand. 66. See, also, opinion of Carr, J., in *Stokes & Smith v. The Upper Appomattox Company*, 3 Leigh, 361.

In Goddard on Easement it is said: "In like manner a right may be acquired to obstruct the water of a stream from flowing in its usual course, and pen it back on the land of riparian proprietors, if the practice of obstructing and penning it back has continued for twenty years, uninterruptedly, and if the servient owner has been prejudiced thereby." Goddard on Easement, 249, citing numerous American cases: *Sherwood v. Burr*, 4 Day, 244; *Williams v. Nelson*, 2 Peck, 141; *Baldwin v. Calkins*, 10 Wend. 169; *Vliet v. Sherwood*, 35 Wis.

In the case of *Sherwood v. Burr*, *supra*, this period was stated to be in analogy to the statute of limitations, but no period short of that required by such statute to gain a title to land, will be sufficient for this purpose.

In the case of *Ricard v. Williams*, 7 Wheaton, 110, Mr. Justice Story, in delivering the opinion of the supreme court of the United States, says: "In general it is the policy of courts

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of law to limit the presumption of grants to periods analagous to those of the statute of limitations, in cases where the statute does not apply."

In the case of *Scott v. Beutel*, 23 Gratt. 1, this question was before this court, and it was claimed by the appellants, that the culvert being an easement in existence for more than fifteen years before the sale, stands under the laws of Virginia on the same footing as an easement which had been used for twenty years, stands at common law. The court did not decide the question, saying, that as to the proposition, which seems to be a claim by the heirs of McKildoe by prescription, it is sufficient to remark, that the whole property, both the lot on which the culvert stands, and the lot for which the use is claimed, were under the same ownership, and that there could be no servitude in favor of one upon the other. 23 Gratt. 516.

The general rule of law as applied to this subject is, that independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flood of water in his own lands, without diminution or alteration. But an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or corrupted in quality, as by the exercise of certain trades; yet if the occupation of the party so taking or using it shall have existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right. And twenty years exclusive enjoyment of water in any particular manner, adverse and injurious in its nature, affords a conclusive presumption of right in the party so enjoying it, derived from grant. But no such presumption of a grant will arise from an adverse use and possession for any shorter period: the statute of limitations as to entry, or, as for bringing an action for land, does not apply to this adverse user of an incorporeal hereditament. And the action of the circuit court instructing the jury that an adverse

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possession for ten years would raise this presumption, is erroneous, and for that reason the judgment will be reversed.

It is not necessary to notice other errors growing out of the instructions given, as the foregoing disposes of the case here. But in view of the language used in the third instruction of the defendants, given by the court, that "they (the jury) are warranted in presuming such authority in the circumstances of this case, and *from the great length of time since the dam was erected,*" &c., it may not be altogether useless to remark that this court has said, in *McDowell v. Crawford*, 11 Gratt. on page 402, that "it is a fundamental maxim that the court responds to questions of law, and the jury to questions of fact; the court must decide on the admissibility of evidence, that being a question of law: but not as to its weight after it is admitted, that being a question of fact." Citing, with approval, Mr. Conway Robinson (1 Rob. Prac. 338) as saying, the decided causes "evinced a jealous care to watch over and protect the legitimate powers of a jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the doctrine, that when the evidence is *parol*, any opinion as to the *weight, effect, or sufficiency* of the evidence submitted to the jury, *any assumption of a fact as proved*, will be an invasion of the province of the jury." See, also, Mr. Barton's Law Practice, 214, citing *Barring v. Reeder*, 1 H. & M. 174; *Moore v. Chapman*, 3 H. & M. 266; *Fisher's ex. v. Duncan & Turnbull*, 1 H. & M. 366; *Whiteacre v. McIlhenny*, 4 Munf. 310; *McCrae v. Scott & Saunders*, 4 Rand. 463. Mr. Barton observes, from these authorities, that "For making observations or instructions to the jury as to the weight to be given by them to any particular part of the testimony, or to the whole evidence, the cause may be reversed and a new trial awarded." See, also, *Davis v. Miller*, 14 Gratt. 1; *Hopkins v. Richardson*, 2 Gratt. 486.

The *great length of time, or what length of time had elapsed since the dam was erected*, was a question of fact for the jury to determine from the evidence adduced in the case.

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The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, is of opinion, for reasons stated in writing and filed with the record, that the circuit court of Grayson erred in refusing to give the plaintiff's third instruction, and in giving the fourth and fifth instructions asked for by the defendant. It is therefore considered by the court that the said judgment be reversed and annulled, and the case be remanded to the said circuit court of Grayson, for a new trial to be had therein, in accordance with the foregoing opinion of this court and the views herein; and it is further considered, that the plaintiff in error recover against the defendant in error his costs by him expended in the prosecution of his writ of error aforesaid in this court. Which is ordered to be certified, with the foregoing opinion, to the said circuit court of Grayson.

JUDGMENT REVERSED.

Staunton.

P. EPISCOPAL E. SOCIETY v. CHURCHMAN'S REPS.

SEPTEMBER 25TH, 1885.

1. CHARITABLE BEQUESTS—*Case at bar*.—Testator, in 1880, bequeathed money to be invested by a fiduciary, giving ample security, in safe interest-bearing funds, the interest only to be applied to the use of his legatee during her life, and at her death, "the principal and any unexpended interest to be paid to the trustees of the Protestant Episcopal Education Society of Virginia" (incorporated in 1875), "said bequest to be used exclusively for educating poor young men for the Episcopal ministry, upon the basis of evangelical principles as now established."

HELD:

1. The bequest to the legatee corporation is not null and void, because not absolute for its own use as a corporate body, but *in trust* to be exclusively used for the trusts therein named, and because those trusts are religious in their character, and too vague and indefinite to be upheld under the law of this State, or to be administered by a court of chancery, even if merely educational as contemplated by Code 1873, chap. 77, sec. 2.
2. The bequest is not contrary to public policy, but is valid both at common law and under Code 1873, chap. 77, and is enforceable by the chancery courts of this State.
2. CORPORATIONS—*Trustees*.—Corporations may take and hold estates for the use of another, if not for purposes foreign to the objects of their creation; and a devise or bequest to a corporation in trust, if otherwise valid, is not for that reason, void.
3. TRUSTS—*Express—Implied*.—Where in the nature of things, a trust is created, it is immaterial that it is not expressly declared in terms.
4. CHARITIES—*Definition*.—In a legal sense, a charity is a gift to be applied, consistently with the laws, for the purpose of benefiting an indefinite number of persons in any respect whatever, and it is not material that the purpose should be expressly designated as charitable.

Syllabus—Statement.

5. RELIGIOUS USES—*Public policy*.—As exhibited by the legislation of this State, there has never been any hostility here to bequests for religious uses. See Code 1873, chapters 75 and 77.
6. *IDEM—Idem*.—This court has never decided that bequests for religious uses were void, for that reason alone. See *Gallego v. Attorney-General*, 3 Leigh, 450.
7. EQUITABLE JURISDICTION AND RELIEF—*Charitable uses—Common law—43 Elizabeth—Act of 1839*.—At common law chancery courts had jurisdiction to enforce bequests for charitable uses. Statute of 43 Elizabeth did not confer such jurisdiction, but only created an auxiliary remedy by commission, &c. Said statute was local, and never in force here. But if it was general in its operation in some respects, it was not repealed by the Act of 1792, but in those respects was preserved by the saving clause of that act. In any event, the Act of 1839, (Code 1873, chap. 77,) clearly validates and makes enforceable all gifts for such purposes, subject to certain restrictions therein contained.
8. CASES REVIEWED.—*Baptist Association v. Hart*, 4 Wheaton, 1; and *Gallego v. Attorney-General*, 3 Leigh, 450—disapproved. *Vidal v. Girard*, 2 Howard, 127—approved.

Appeal from decree of circuit court of Augusta county, rendered 18th June, 1883, in the cause of William T. Rush, administrator, with the will annexed, of Henry Jewett Churchman, dec'd, plaintiffs, *against* John S. Churchman and others, heirs at law, legatees and distributees of the said decedent, and The Protestant Episcopal Education Society of Virginia, defendants.

The object of the suit was to expound the said will, and especially to construe and declare null and void the 4th clause thereof, which is as follows:

“At the death of said Alice Clark Churchman, whenever that may be, the principal sum of \$4,000, and any unexpended interest, shall be paid to The Trustees of the Protestant Episcopal Education Society of Virginia—the said bequest to be used exclusively for educating poor young men for the Episcopal ministry, upon the basis of evangelical principles as now established.”

The cause having been fully matured, upon the bill, the sev-

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eral answers and the exhibits, the circuit court decided the bequest to the said society to be void, because the same is to the corporation, not absolute for its own use as a corporate body, but *in trust* to be *exclusively* used for the purpose therein named, and because the uses and trusts declared by the said testator are null and void, being religious in their nature, and too vague and indefinite to be upheld under the law of this State, or to be administered by a court of chancery, even if said trusts were merely educational, as contemplated by section 2, chapter 77, Code 1873. From this decision the said society obtained an appeal to this court.

Opinion fully states the case.

Hugh W. Sheffey and *E. C. Burks*, for the appellant.

NOTE OF ARGUMENT filed by Judge E. C. Burks:

CHARITIES.

I. Cases decided by the Virginia court of appeals:

1, *Gallego's Ex'ors v. Attorney General*, 3 Leigh, 450, decided 1832; 2, *Jamey v. Latane*, 4 Leigh, 327, decided 1833; 3, *Literary Fund v. Dawsons*, 10 Leigh, 147, decided March, 1839; 4, *Same v. Same*, 1 Rob. 402, decided 1842; 5, *Brooke v. Shacklett*, 13 Gratt. 301, decided 1856; 6, *Seaburn's ex'ors v. Seaburn*, 15 Gratt. 423, decided 1859; 7, *Kelly v. Love's adm'r*, 20 Gratt. 124, decided 1870; 8, *Virginia v. Lery*, 23 Gratt. 21, decided 1873; 9, *Kinniard v. Miller's ex'or*, 25 Gratt. 107, decided 1874; 10, *Roy's ex'or v. Rowzie*, 25 Gratt. 599, decided 1874; 11, *Hoskinson v. Pusey*, 32 Gratt. 428, decided 1879; 12, *Missionary Society v. Culvert's adm'r*, 32 Gratt. 357, decided 1879; 13, *Cozart v. Manderille's ex'or*, cited 32 Gratt. p. 365, decided 1879; 14, *Stonestreet v. Doyle*, 75 Va. 356, decided 1881.

II. Cases decided by supreme court of United States:

1, *Baptist Association v. Hart's ex'ors*, 4 Wheat. 1, decided

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1819; 2, *Beattie v. Kurtz*, 2 Peters, 566, decided 1829; 3, *Inglis v. Sailor's Snug Harbor*, 3 Peters, 99, decided 1830; 4, *Vidal v. Girard's ex'ors*, 2 How. 127, decided 1844; 5, *Wheeler v. Smith*, 9 How. 55, decided 1849; 6, *McDonogh's ex'ors v. Murdoch*, 15 How. 367, decided 1853; 7, *Fontain v. Ravenel*, 17 How. 369, decided 1854; 8, *Perin v. Carey*, 24 How. 465, decided 1860; 9, *United States v. Fox*, 94 U. S. 315, decided 1876; 10, *Ould v. Washington Hospital*, 95 U. S. 303, decided 1877; 11, *Kain v. Gibboney*, 101 U. S. 362, decided 1879; 12, *Russell v. Allen*, 107 U. S. 163, decided 1882.

NOTE.—*Kain v. Gibboney* cites most of the Virginia cases. *Russell v. Allen* gives the substance of the cases previously decided by the supreme court.

III. Upon the general subject:

See 2 Perry on Trusts, ch. 23, §§ 687-748; 2 Story's Eq. Juris., ch. 32, §§ 1136-1146; 2 Pomeroy's Eq. Juris., §§ 1018-1029; Proffat's note to *Dashiell v. Attorney-General*, 9 Amer. Dec. 577-588; Freeman's note to *Bridges v. Pleasants*, 44 Amer. Dec. 98-101; *Going v. Emery*, 16 Pickering, re-reported 26 Amer. Dec. 645. Opinion by Chief Justice Shaw, and note by Editor.

CASE STATED.

Dr. Henry J. Churchman, a citizen of Virginia, residing in Augusta county, died unmarried and without issue, and his will (olograph), dated September 22, 1880, was duly admitted to probate in the circuit court of said county, March 16, 1881.

He died seized and possessed of real and personal estate, some of the former (land) situate in the states of Missouri and Nebraska, all of which he disposed of or intended to dispose of by his will.

In clauses 1, 2, 3, he gives some directions as to his burial, &c., provides that his just debts shall be paid, and bequeaths his gold watch and chain and his library to his sister Virginia

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M. Churchman. He then proceeds to dispose of the residue of his estate.

The following extracts are taken from what follows the third clause:

"4. Four thousand dollars (\$4000) of my remaining estate shall go into the hands of a guardian or trustee, as may at the time be deemed best by the court, for my niece, Alice Clark Churchman, daughter of Dr. V. T. Churchman, deceased, to be invested in some safe, permanent interest-bearing fund, so that the semi-annual or annual dividends arising therefrom shall go to the support and education of the said Alice Clark Churchman until she is twenty-one (21) years old, when this same fund, if not already in the hands of a trustee, shall then go into the hands of a trustee, to be invested as before in some safe, permanent interest-bearing fund, that she, Alice, may receive for her sole and separate use, notwithstanding any marriage she may contract, the interest-bearing dividends that may accrue semi-annually or annually on the fund held for her benefit as long as she may live. In no case, however, shall the principal sum of four thousand dollars (\$4000) be diminished. The guardian and the trustee shall give ample security under the direction of the court for the amounts intrusted.

At the death of the said Alice Clark Churchman, whenever that may be, the principal sum of four thousand dollars (\$4000) and any unexpended interest shall be paid to "The Protestant Episcopal Educational Society of Virginia," said bequest to be used exclusively for educating poor young men for the Episcopal ministry upon the basis of evangelical principles as now established.

5. Three thousand dollars (\$3000), should that amount be remaining, shall go into the hands of a guardian for Henry Jewett Churchman, son of my deceased brother, Dr. V. T. Churchman, to be invested in some safe, permanent, interest-bearing fund, so that the semi-annual or annual interest divi-

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dends arising therefrom, shall go to the support and education of the said Henry J. Churchman, until he dies or is twenty-one (21) years old, when the said three thousand dollars (\$3000) undiminished and any unexpended interest there may be shall be paid to "The Trustees of the Protestant Episcopal Education Society in Virginia," to be used under precisely the same restrictions and for the same purposes as the preceding sum under head 4. Ample security shall be required for the principal as above.

6. Three thousand dollars (\$3000), should so much remain, shall next go into the hands of a guardian in like manner for Vincent Tapp Churchman, son of my deceased brother, Dr. V. T. Churchman, to be invested in some safe, permanent, interest-bearing fund, so that the semi-annual or annual dividends arising therefrom shall go to the support and education of said Vincent Tapp Churchman, until he dies or is twenty-one (21) years old; when the said three thousand dollars (\$3000) and any unexpended interest shall go at once into the hands of "The Trustees of the Protestant Episcopal Education Society in Virginia," to be used under precisely the same restrictions for the same purposes as stated under head 4. Ample security shall be required as before in this case also. * * * * *

7. [Gives \$4000 absolutely to his sister, Virginia M. Churchman, with privilege of taking McMahon house and grounds belonging to it at \$2000 in part satisfaction of the legacy of \$4000; and gives to his sister Fanny Cosby Geiger and to his brother John S. Churchman each one dollar.]

8. Should there be property still remaining, I wish the same (all of it) to be paid to "The Trustees of the Protestant Episcopal Educational Society in Virginia," before mentioned, to be used under the same restrictions and for precisely the same purposes as the preceding bequests to the same society. To more fully identify beyond mistake the society I mean, I state that it is the same for which Bishop Whittle, of Virginia, is now and has been for years collecting in his usual visitations."

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* * * * *

In the month of March, 1881, the administrator with the will annexed of the testator filed his bill in the circuit court of Augusta county against the heirs at law and distributees of the testator and legatees under his will, including "The Trustees of the Protestant Episcopal Educational Society in Virginia," asking for a construction of the will, the guidance and direction of the court generally in the administration of the estate, and distinctly raising and presenting the question as to the validity of the bequests to the society aforesaid.

Several of the defendants filed answers to the bill—among them "The Trustees of the Protestant Episcopal Education Society in Virginia," asserting its claim to the legacies given to it by the will, and showing a copy of an act of the general assembly filed with its answer, that it was duly incorporated January 8, 1875 (Acts 1874-5, 16).

It was proved that the testator was a member and communicant of the Protestant Episcopal Church (Mr. Hullihen's deposition); that the collections made by Bishop Whittle in his visitations were for "The Trustees of the Protestant Episcopal Education Society in Virginia" before mentioned; that this corporation has been engaged from the date of its charter, and is still engaged, in educating or aiding in the education of poor young men for the ministry of the Protestant Episcopal Church, upon the basis of evangelical principles as now established; that the trustees named in the act of incorporation were the bishop and assistant bishop, twelve clergymen and ten lay-members of the Protestant Episcopal Church; and that the value of the property or money held by the corporation does not exceed the sum of two hundred and fifty thousand dollars (the limit imposed by its charter), and that such value will be far less than that sum if increased by the will of the testator.

Upon a hearing of the cause, June 18, 1883, the circuit court pronounced its decree, declaring that as to the devises and be-

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quests to "The Trustees of the Protestant Episcopal Education Society in Virginia," "the will does not give them absolutely" to said corporation "for its own use as a corporate body, but the same are given to said corporation *in trust* to be *exclusively* used for the purpose therein named, that the uses and trusts declared by said testator are null and void, because said trusts are religious in their character, and too vague and indefinite to be upheld under the law in this State or to be administered by a court of chancery, even if said trusts were merely educational as contemplated by section 2, chapter 77, Code of Va. 1873;" and accordingly so adjudged, ordered and decreed, and further that "such portion of his estate as the testator attempted to give to said corporation upon the trusts named in the will passes to the distributees and heirs at law of said testator as property undisposed of by said will."

From this decree the present appeal was allowed to "The Trustees of the Protestant Episcopal Education Society of Virginia."

It will be observed, that while the legatee-corporation is correctly described in the 5th and 6th clauses of the will, there is a slight inaccuracy in giving the corporate name in the 4th and 8th clauses. But this is wholly immaterial, as the testator, to more fully identify beyond mistake the society he meant, states in his will "that it is the same for which Bishop Whittle, of Virginia, is now and has been for years collecting in his usual visitations;" and it is proved that the society for which the collections had been and were being made by the bishop is "The Trustees of the Protestant Episcopal Education Society in Virginia." That such proof is competent for the purpose of establishing identity, see *Roy's ex'ors v. Rowzie*, 25 Gratt. 605.

There are two propositions upon which the learned judge of the circuit court rests his decree. First, that the bequests to the corporation were not absolute, "for its own use as a corporate body." Second, that "the same were given to said corpo-

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ration *in trust* to be *exclusively* used for the purpose therein [in the will] named; that the uses and trusts declared by said testator are null and void, because said trusts are religious in their character, and too vague and indefinite to be upheld under the law of this State or to be administered by a court of chancery, even if said trusts were merely educational, as contemplated by section 2, chapter 77, Code of Virginia 1873."

We shall endeavor to show, that the decree cannot be sustained upon either of the grounds on which the judge bases it, or upon any other recognized by the law, and that the devises and bequests in question are valid and should be enforced against the personal representative, heirs at law, and distributees of the testator.

PROPOSITION I.

"The legacies were not given absolutely to the corporation for its own use as a corporate body." Decree.

We maintain, that they were given for *corporate purposes*, and if so, the corporation, in respect to them, is not a *trustee* in any other than in the general sense that every corporation is a trustee of the powers and franchises with which it is invested for the purposes of its incorporation. For the proper use of these, it is accountable to its creator—the government. For misuse or abuse, forfeiture is the penalty, and it may be enforced or not as government wills. This principle is elementary and is illustrated by many judicial decisions. See *The Banks v. Poltoux*, 3 Rand. 136; *Wroten's assignee v. Armat*, 31 Gratt. 228, and cases cited; Angell and Ames on Corp. §§ 774–778.

Among the powers conferred on the appellant (corporation) by its charter is the power to acquire property, real and personal, not exceeding in value at any one time two hundred and fifty thousand dollars, to be applied to the objects for which it was incorporated.

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What are those objects?

The charter, § 2, declares them.

"The object of this society shall be the education, or aiding in the education of such young men as in the judgment of said trustees or their successors, or of any executive committee duly appointed by them, shall seem expedient."

The object is general—"education or aiding in education"—it has no other limit. Education of any and every kind and description, whether mental, moral, religious or otherwise—adapted to prepare and fit for any calling or business or for activity and usefulness in life—education of young men such as the trustees of the corporation may select—whether they be high or low, rich or poor, of foreign birth or "native here and to the manor born."

Now, it cannot be denied that it was competent for the legislature to create such a corporation as this—with such powers and for such an object as the charter describes, and that it may lawfully receive and hold *in its own right* any donation made to it for its corporate object—"education or aiding in education."

If the legacies in question had been given to the corporation without indicating the use to which they were to be applied, or if they had been given with the direction in terms that they were to be applied to "the education or aiding in the education of such young men as in the judgment of said trustees [of the corporation] or their successors, or of any executive committee duly appointed by them, shall seem expedient," nobody would doubt that the bequests would have been valid, because in the first case the charter declares the use which the will merely implies, and in the second case the same use is declared in terms by both will and charter.

We understand this to be substantially admitted by the learned counsel of the appellees.

It will hardly be contended, we presume, that if the legacies had been given in this form, that the corporation would have

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been regarded as a *mere trustee*—as holding the legacies upon a *special trust*, distinct from the *general trust* with which it is clothed by its charter, namely, *the duty* to use and apply its means, however acquired, to “education or aid of education,” &c., as the charter prescribes.

We insist, that the words added to the gift, directing the use, do not alter the case. The *particular* use declared by the testator falls within the *general* uses authorized and declared by the charter, to wit, “education and aid in education,” &c., and the corporation in taking the legacies, takes them in its *corporate capacity* and for *corporate purposes*, and not otherwise.

In the McDonogh will case (*McDonogh's ex'ors v. Murdoch*, 15 How. 413), a question being raised as to whether the city of Baltimore could take the legacy bequeathed to it for the uses declared by the testator, Mr. Justice Campbell (delivering the opinion of the supreme court of the United States) said, “All the property of a corporation like Baltimore is held for public uses, and when the capacity is conferred or acknowledged to it to hold property, its destination to a public use is necessarily implied. Nor can we perceive why a designation of a *particular* use, if within the *general objects* of the corporation, can affect the result; nor is there anything in the nature of the uses declared in this will which can withdraw from the legacy a legal protection.”

So we say, in this case, if the *particular* use declared by the testator is “within the *general objects* of the corporation,” the corporation may take the legacies and hold them, as it holds other property under its charter, and for the use declared.

We invite special attention to the case of *Missionary Society v. Calvert's adm'r*, 32 Gratt. 357. In that case, the bequests to “The Missionary Society of the Methodist Episcopal Church,” a corporation created by the state of New York, were accompanied by the following directions: “*It is my will that all my executors shall pay to the missionary society above stated shall be paid to the India mission by that society of New York, and the*

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receipt of the treasurer shall be to that effect," &c. The proceeds of the sale of the estate given by the testator to his wife for life, he directs, "shall be paid over at her death to the said missionary society at New York, for the benefit and [to be] applied to the India mission."

It was decided that these were valid bequests; and in answer to the argument of counsel that the bequests were to the corporation *in trust* and were invalid because of the *indefiniteness of the trust*, the judge who delivered the opinion concurred in by the other judges, said: "Some question is raised by the appellee as to the validity of the bequest to the missionary society, on the ground that the bequest is to the society *in trust* for the 'India mission,' and that the trust is too indefinite. I do not think this objection well founded. The real legatee is the Missionary Society of the Methodist Episcopal Church, incorporated by the legislature of New York. No trust is created by the bequest. Among the various missions to which the funds of the society are applied is the India mission mentioned in the will, and the testator merely indicates a preference for that mission over others in the application of the property bequeathed."

Of course, what was meant by the expression "that no trust is created by the bequest," was, that there was no *special trust* distinct from the *corporate objects and trusts*.

The bequests fell within the *scope* of these *general* objects, though special directions were given by the testator that the donations should be applied by the legatee to *only one* of these objects; and therefore the corporation did not take as *mere trustee*.

So, in the case of *Cozart and wife v. Manderville's ex'or*, referred to in *Missionary Society v. Culvert's adm'r*, *ubi supra*, the bequest to the "Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America," incorporated by the state of New York, "to be equally divided

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between them," was upheld. It was contended in argument, that the legatee was uncertain—that the language, "to be equally divided between them," shewed that the testator contemplated two legatees, and it did not appear who they were. But the court held, that there was but one legatee—the corporation named in the will—and that as it appeared by the constitution and by-laws of the corporation that it had two departments, one directed to domestic and the other to foreign missions, the intention of the testator was that the corporation should take the property bequeathed *and divide it equally between the two departments*. Here, it might have been said, that a trust was created by the direction of the testator as to the use of the property given—one-half to be applied to domestic and the other half to foreign missions, and that the trust was too indefinite. But the court held, that the bequest was to the corporation for *corporate purposes*, and not to it as *mere trustee*, quoting from the opinion of the court in *Roy's ex'or v. Rowzie*, 25 Gratt., on page 611 (at top).

The language used by Judge Moncure, in delivering the opinion of the court in the last-named case, will be found on the page referred to. It is pertinent here, and we give it in his words: "A bequest to a corporation, *as a mere trustee for indefinite purposes, not embraced in the purview of the acts aforesaid* [Acts of the General Assembly 1839 and 1841 are referred to], would be void for uncertainty, because there must in general be certainty as to the *cestuis que trust*, and as to the objects of the trust in every case of trust, in order to make it valid. Certainty only as to the trustee is not sufficient. *But a bequest to a corporation, for the general purpose of its incorporation, is not indefinite or uncertain in any respect*. Such is the bequest in this case."

The case of *Cozart and wife v. Manderille's ex'or*, it seems, was never reported. We have, however, procured a printed copy of the record, and also a certified copy of the opinion of

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the court (believed to be unanimous), delivered by Judge Anderson. These copies will be tendered to the court and opposing counsel for examination. The case is of importance in other aspects yet to be considered.

If the legacies in question are to the corporation in its corporate capacity, and for corporate purposes, it matters not how vague and indefinite the designated objects may be. The legacies are valid. In such a case, the doctrine of charitable uses has no application. For, as a distinguished author observes, "‘charitable trusts’ should be carefully distinguished from gifts to corporations, which are authorized by their charters, or other statutes, to receive and hold property, and apply it to objects which fall within the general designation of charitable. Such gifts are permitted in the states where the peculiar doctrine of ‘charitable trusts’ has been abrogated, and they are regulated by the general rules of law applicable to all corporations, or by the provisions of the individual charter." 2 Pomeroy's Eq. Jurisp., § 1020, note 1, and cases cited.

The inference drawn by appellees' counsel in their note from the words in the will—"shall be paid to"—"paid over"—"shall go at once into the hands of," instead of "given to," the education society—when the words in the gift to the sister are, "I give," &c.—that a trust instead of an absolute gift to the society is indicated—is rather strained. It must be admitted the language is of itself sufficient to pass an absolute estate. Similar language was employed by the testator in *Missionary Society v. Calvert's adm'r*, yet no such inference was drawn from that language in that case. Compare the two wills.

If the views which have been presented are sound, no further argument is necessary. But not knowing how they may strike the mind of the court, we propose to shew that the bequests are valid, even though, as held by the circuit judge, made to the corporation as a mere trustee.

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PROPOSITION II.

"The same [the legacies] are given to said corporation *in trust*, to be *exclusively* used for the purpose therein [in the will] named—that the uses and trusts declared by said testator are null and void, because said trusts are religious in their character, and too vague and indefinite to be upheld under the law of this state, or to be administered by a court of chancery, even if said trusts were merely educational, as contemplated by section 2, chapter 77, Code of Virginia, 1873."—Decree.

This proposition involves the doctrine of charitable uses or trusts, or, as they are more generally briefly denominated, "charities."

Many definitions are attempted in the books. Charity is a gift to a general public use, which extends to the poor as well as to the rich. Lord Hardwicke in *Jones v. Williams*, 1 Amb. 652.

A charity in a legal sense may be more fully described as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons—either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable. Justice Gray in *Jackson v. Phillips*, 13 Allen, 556 (cited 2 Perry on Trusts, 697).

All property held for public purposes is held as a charitable use, in the legal sense of the term. Justice Wayne in *Perin v. Carey*, 24 How. 506.

A charitable use, where neither law nor public policy forbids, may be applied to almost anything which tends to promote the well-doing or well-being of social man. Justice Swain in *Ould*

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v. *Washington Hospital*, 95 U. S. 311, citing Perry on Trusts, § 687.

Charity is generally defined as a gift for a public use. Such is its legal meaning. Justice Strong in *Kain v. Gibboney*, 101 U. S. 365.

They [charities] may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. Justice Gray in *Russell v. Allen*, 107 U. S. 167.

To give it [a gift] the character of a public charity there must appear to be some benefit to be conferred upon, or duty to be performed towards, either the public at large, or some part thereof, or any indefinite class of persons. *Old South Soc. v. Crocker*, 119 Mass. 23, citing *Going v. Emery*, 16 Pick. 107, re-reported 26 Am. Dec. 645—opinion in last-named case by Chief Justice Shaw, to which the attention of the court is particularly invited.

In the books it is said the thing given becomes a charity where the uncertainty of the recipients begins. This is beautifully illustrated in the Jewish law, which required the sheaf to be left in the field for the needy and passing stranger. Justice McLean in *Fontain v. Rarenal*, 17 How. 384.

The word "charity" in its *widest* sense, says a learned author, denotes all the good affections men ought to bear towards each other; but in a court of chancery the signification of the word is derived from the statute of Elizabeth (43 Eliz. c. 4). Hence it has been said, that those purposes are considered charitable which are enumerated in the statute, or which by analogy are deemed within its spirit and intendment. 2 Perry on Trusts, § 697.

The only reference that the statute makes to religious uses is to "repair of churches." * * * But, in a christian community of whatever variety of faith and form of worship, there would be little need of a statute to declare gifts for relig-

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ious uses to be charitable. Therefore, both before and since the statute, gifts for the advancement, spread and teaching of Christianity, or for the convenience and support of worship, or of the ministry, have been held charitable. *Id.* § 701. See numerous illustrations given by the author in the same section, amongst them a gift "to a theological seminary for a permanent fund to be applied to the education of pious and indigent youth for the ministry, who adhere to the Westminster Confession of Faith." *McCord v. Ochiltree*, 8 Blackf. (Indiana) 15.

A bequest for the advancement of *religion* and *education* among an indefinite number of persons is a charitable bequest. *Jackson v. Phillips*, 14 Allen, 552.

Bequests for the circulation of bibles and other religious books and tracts are charitable gifts. *Attorney-General v. Stepney*, 10 Ves. 22.

From the foregoing definitions and descriptions of "charities" and the illustrations furnished by decided cases, there can be no doubt that the bequests to the appellant corporation, if given *in trust* for purposes *not covered by its charter*, are charitable in a legal sense—"Charitable Trusts."

So considered, are they valid in Virginia? "In Virginia," we say, because if the question were to be determined by the law as it is in England, and in every state in the American Union, except Virginia, Maryland, North Carolina, New York (under recent decisions) and *perhaps* one or two other states, it would be answered unhesitatingly in the affirmative. See *Kain v. Gibboney*, 101 U. S. 366 (at bottom); *Russell v. Allen*, 107 U. S. 166 (bottom); 2 Perry on Trusts, (2d ed'n) § 748, note 1; Pomeroys's Eq. Jurispr. § 1029, note 2; Proffatt's note appended to *Dashiell v. Attorney-General*, 9 Amer. Dec. 577-588.

But how is it in Virginia? The decree of the circuit court, adjudging that the legacies were given *in trust* to be *exclusively* used for the purpose named in the will, declares that the trusts are "null and void, *because said trusts are religious in their character.*"

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What is meant by this? It surely could not have been intended to affirm that a trust, definite and certain in its character and objects, and such as would be valid and enforceable if for any secular purpose, is void, even in Virginia, because and *merely* because "*religious* in its character!"

If it was so intended, we beg most respectfully to enter our earnest protest against such a doctrine.

We have seen that indefinite trusts for the advancement and promotion of the Christian religion are reckoned as charitable trusts in a legal sense, and whenever heretofore they have been declared by the Virginia courts to be void, it has been, not because "*religious* in their character," but because, and *only* because too indefinite to be executed by the courts—the statute of Elizabeth, which *alone*, as it was supposed, gave them validity, having been repealed in 1792. We appeal to the reported decisions of our highest courts for confirmation of this statement.

We rather suppose that the court meant to declare that the trusts were too indefinite to be upheld in Virginia unless legalized by our statute law (Code of 1873, ch. 77, § 2), and that they were not thus legalized because they were "*religious*," and not *educational* within the meaning of that law.

We shall argue upon that supposition, and consider the objection, as thus understood, in connection with the further objection urged in the decree, that "they [the trusts] are too vague and indefinite to be upheld under the law of this state, or to be administered by a court of chancery even if said trusts were merely educational as contemplated by section 2, chapter 77, Code of Virginia 1873."

After the repeal in 1792 of the statute of Charitable Uses, 43 Eliz. c. 4, the question arose whether such trusts, as a class distinct from ordinary trusts, any longer existed in Virginia and could still be supported on the peculiar principle which had theretofore been applied to them.

The question was first presented in *Baptist Association v.*

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Hart's Ex'ors, 4 Wheat. 1, decided by the supreme court of the United States in 1819; and the question was determined in negative, Chief Justice Marshall delivering the opinion of the court.

It next came before the court of appeals of Virginia in *Gallego v. Attorney General*, 3 Leigh, 450, decided in 1832, and the ruling in *Baptist Association v. Hart*, was approved and followed.

The decisions in *Janney v. Latane*, 4 Leigh, 327, in 1833, and *Literary Fund v. Dawsons*, 10 Leigh, 147, in 1839, were the same way, and to the same effect have been numerous decisions of our court of appeals in cases not affected by the statutes, to be presently noticed, the last case being *Stonestreet v. Doyle*, 75 Va. 356, decided in 1881.

In the famous Girard will case, decided by the supreme court of the United States in 1844, the case of *Baptist Association v. Hart's ex'ors*, was reviewed and the doctrine there laid down disapproved and overruled, and it was held that charitable uses do not depend for their existence on the statute of 43 Eliz. ch. 4, but that they antedated that statute, which was merely intended to regulate them, and that the court of chancery, independently of the statute, had an original and inherent jurisdiction to enforce them. The court was brought to this conclusion upon a re-examination of the authorities, and more particularly from the evidence furnished by the then recent publications of the commissioners on the public records in England, among which were found many cases wherein the court of chancery entertained jurisdiction over charities long before the statute of 43 Eliz., and some fifty of those cases extracted from the printed calendars were laid before the court. "Whatever doubts, therefore," said Mr. Justice Story, delivering the opinion of the court, "might properly be entertained upon the subject when the case of the *Trustees of The Philadelphia Baptist Association v. Hart's executors*, 4 Wheat. 1, was before the court (1819), those doubts are entirely

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removed by the late and more satisfactory sources of information to which we have alluded." *Vidal v. Girard's ex'ors*, 2 How. 127.

In *Russell v. Allen*, 107 U. S. 163, decided in 1882, the substance of all the cases on charities previously decided by the supreme court is given in the opinion of the court delivered by Mr. Justice Gray. Commenting on the case of *Baptist Association v. Hart*, the learned judge said, that that case "was decided upon an imperfect survey of the early English authorities, and upon the theory that the English law of charitable uses, which, it was admitted, would maintain the bequest, had its origin in the statute of Elizabeth, which had been repealed in Virginia. That theory has since, upon a more thorough examination of the precedents, been clearly shown to be erroneous," citing *Vidal v. Girard*, 2 How. 127; *Perin v. Carey*, 24 How. 465; *Ould v. Washington Hospital*, 95 U. S. 303.

In the case last named, on pp. 309, 310, Mr. Justice Swayne, speaking for the court, after referring to the doubts once entertained upon the subject, remarks that "upon reading the statute [43 Eliz. ch. 4,] carefully. one cannot but feel surprised that the doubts thus indicated ever existed. The statute is purely remedial and ancillary. * * * * The learning developed in the three cases mentioned [*Vidal v. Philadelphia*, 2 How. 128; *Fontain v. Ravenel*, 17 How. 397, and another case,] shows clearly that the law as to such cases, and the jurisdiction of the chancellor, and the extent to which it was exercised, before and after the enactment of the statute, were just the same."

Thus it is seen, that while the error into which the supreme court had fallen in *Baptist Association v. Hart's ex'or*, was corrected by that court as soon as opportunity was afforded, the same error committed by the Virginia court of appeals was adhered to by that court and perpetuated, so far as judicial decision can perpetuate error.

It is true, that since the decision in *Gallego v. Attorney-Gen-*
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ral, several Virginia cases have come before the supreme court, in which that court followed the Virginia precedents, but that was only because the court, according to its course, was bound by the local law. See *Wheeler v. Smith*, 9 How. 55; *Kain v. Gibbony*, 101 U. S. 362. The case last named, decided in 1879, refers to most of the Virginia cases on the subject.

While it is admitted that we are bound by the Virginia decisions, so far as they go, the court will not be disposed to extend them in the upholding of a doctrine now demonstrated by an overwhelming array of authorities to be erroneous.

As soon as the early cases had, as was supposed, settled the law in the State, that the effect of the repeal in 1792 of the statute of 43 Eliz. was to put *all* charitable uses for the future on the footing of ordinary trusts and thus render them incapable of enforcement, the legislature at once set about to repair, to a limited extent, the great mischief that had been done. Its attention seems to have been directed only to those charitable trusts that were religious and educational. As to the former, it had been said by Judge Tucker, in *Gallego v. Attorney-General*, that the title to real estate could not be held in trust even for church buildings and grave-yards. This was certainly a grievance that needed redress. Accordingly, the legislature passed an act February 3, 1842 (Acts 1841-42, ch. 102, p. 60), legalizing previous conveyances and devises of real estate for the use and benefit of any religious congregation as a place of public worship, and giving authority for future conveyances and devises of land for the same purpose not exceeding two acres in an incorporated town, and thirty acres in the country, with a proviso that the real estate so conveyed or devised should be held by trustees for no other use than as a place of public worship, religious or other instruction, burial-ground, and residence of a minister of the congregation.

At the session of 1846-47, the legislature passed another act, giving to one or more members of any religious congregation the right, in his or their names, on behalf of the congregation,

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to commence and prosecute a suit in equity against the trustees, to compel them to apply the property for the use or benefit of the congregation, as their duty shall require.

At the revision of the laws—1849—these acts of 1842 and 1846–7 were digested and put into the Code, somewhat *enlarged*, “dedication” being added as one of the modes of transfer for the uses and “books or furniture” authorized to be acquired for the benefit of the congregation. See *Brooke v. Shacklett*, 13 Gratt. 311, 312.

By act passed April 26, 1867 (Acts 1866–7, 907), the law was further amended and *enlarged* so as to include land for residence of bishop, &c., and by act February 28, 1866 (Acts 1865–6, 161), the quantity of land authorized to be held by the trustees out of an incorporated town was increased from thirty-two to seventy-five acres.

The law, as it now stands, will be found in Code of 1873, ch. 76, §§ 8–16.

These statutes have been referred to and explained, to show a change in the policy of the State in regard to religious uses after the early decisions of the court of appeals in regard to charitable trusts. To be sure, the statutes are narrow enough, but a review of them shows an increasing tendency in legislation, from time to time, towards liberality.

In regard to education, the change has been more prompt, far-reaching, and decided.

Literary Fund v. Dawson, re-affirming the doctrine laid down in *Gallego v. Attorney-General*, and *Janney v. Latane*, was decided in March, 1839.

During the next month, to-wit: on the 2d day of April, 1839, (Acts 1839, ch. 12, p. 11,) the legislature passed an act authorizing *devises and bequests* for the *establishment or endowment* of *unincorporated* schools, academies and colleges, for the education of free white persons, and prescribing the mode and manner of enforcing the trusts. The act contained a proviso, that it should

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not be so construed as to give validity to any devise or bequest to any theological seminary.

On the 10th day of March, 1841, (Acts 1840-41, ch. 26, p. 52,) an act was passed, the main object of which was to give effect to Martin Dawson's will, but the sixth section was general in its nature, authorizing any person, by *gift in his lifetime, or by last will and testament*, to give property to the president and directors of the literary fund, *for the use of any county or counties, or any incorporated city, town or borough, or directly to such county or counties, or to such city, town or borough*, and directed that the same might be taken and held by the president and directors of the literary fund, *or by the county or corporation courts*, as the case might be, "*to be disposed of in manner and form, to all intents and purposes, as such donor or testator or testatrix may have prescribed,*" with a proviso, that all such gifts or devises should be restricted to literary purposes, or purposes of education, saying nothing about theological seminaries.

Certainly, this act of 1841, was an enlargement of the charity authorized by the act of 1839.

At the revision of the laws in 1849, these two acts were combined and digested, and constitute chapter 80 of the Code of 1849.

March 28, 1873, (Acts 1872-3, ch. 265, p. 243,) section 27, ch. 80 of Code of 1849, was amended, so as to extend the benefits of it to colored persons.

The law, as we now have it, will be found in Code of 1873, ch. 77, §§ 2-10.

The same remark may be made as to this charity that was made in reference to the one first mentioned—that greater liberality was evinced in each succeeding legislative act, and the legislation shows a marked change in the policy of the state on both subjects.

The object was to remedy in part the mischief wrought by the repeal of the act of 43 Eliz., and the decisions of the courts,

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and restore two of the charities, one very fully and the other partially, that had been destroyed by the repeal. The legislation is eminently remedial, and instead of being strictly construed, as contended for by the learned counsel of the appellees in their note, it should receive the most liberal construction, and the charities be upheld, if possible. Such has always been the rule as to this class of trusts.

Courts look with favor upon all such donations, and endeavor to carry them into effect, if it can be done consistently with the law. 2 Perry on Trusts, § 907.

Charitable uses are favorites with courts of equity. The construction of all instruments where they are concerned is liberal in their behalf. *Mills v. Farmer*, 19 Ves. 437; *McGill v. Brown*, Bright (Pa.), 346. Even the stern rule against perpetuities is relaxed for their benefit. Justice Swayne, in *Ould v. Washington Hospital*, 95 U. S. 313.

Being for objects of permanent interest and benefit to the public, they [charities] may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect, if possible, and to carry out the general intention of the donor, when duly manifested, even if the particular form or manner pointed out by him cannot be followed. Justice Gray, in *Russell v. Allen*, 107 U. S. 167.

In *Brooke v. Shacklett*, 13 Gratt. 301, the court experienced much difficulty in upholding the religious use under the deed creating it, but felt itself warranted in favoring that interpretation of the instrument which, consistently with the rules of construction, would place it within the operation of the changed policy of our legislation—p. 319.

In *Hoskinson v. Pusey*, 32 Gratt. 443, the court felt the same difficulty in a like case of a religious use, but nevertheless declared that the deed creating it "should receive a liberal construction, with the view to give effect to the trusts."

The court evinced the same liberal spirit in giving effect to

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devises and bequests for charitable purposes, in *Kelly v. Love*, 20 Gratt. 124; *Kinniard v. Miller*, 25 Gratt. 107; *Roy's ex'or v. Rouzie*, 25 Gratt. 599; *Missionary Society v. Calvert's adm'r*, 32 Gratt. 357; *Cozart v. Manderille's ex'or*, *supra*.

It will be observed, that in *Stonestreet v. Doyle*, 75 Va. 356, where it was held that the devise was invalid, the will was made and the testator died *previous to the year 1839*. He died in 1838. See pp. 357, 364. If he had made his will and died after the passage of the act of 1839, or more certainly after the passage of the act of 1841, no reason is perceived why effect should not have been given to the devise as in the case of *Kelly v. Love supra*, so far as it applied to the *school-purposes* and *education* pointed out by the will. As the will was made and the testator's death took place previous to the passage of these acts, it was very clear that the case was ruled by *Gallego v. Attorney-General*.

Guided by the liberal principles applied by the courts in support of public charities, as illustrated by adjudged cases, let us examine the statute law of the state concerning donations for educational purposes, as that law stood when the legacies in question were given and now stands (Code of 1873, ch. 77, §§ 2, 3, 4, 5, 6, 10), and see what is its proper construction, and whether, under its provisions, the said legacies (treating them as given in trust), are valid.

We hope the court will give the statute the most careful examination. It will be found to be very broad and comprehensive in its terms. It legalizes every transfer of property, real and personal (except transfers for the use of a theological seminary), which has been made since the 2nd day of April, 1839, (with an exception that is immaterial now) or which shall hereafter be made by gift, grant, devise or bequest, for literary purposes or for the education of persons within this state—any persons within the state, white or colored, without regard to sex, age, rank or condition in life—education without any qualification of the term—mental, moral, religious—of

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every grade and description; and it is declared that the conveyance, whether made "to a body corporate or *unincorporated*, or to a natural person, shall be as valid as if made *to or for the benefit of a certain natural person*." The design was, and such is the effect, to remove all difficulty growing out of the uncertainty either of the trustee or beneficiaries and to establish an indefinite charity with all the substantial incidents and qualities of such a charity under the statute of 43 Eliz. c. 4.

Indeed, it would seem from the 5th section, that it is not necessary to give validity to the trust that in its *creation* any trustee should be appointed, for it is there provided that if "no trustee has been appointed," the *court* may appoint one.

If a bequest was made to-day in Virginia, similar to that of Silas Hart, which gave rise to the controversy in *Baptist Association v. Hart's ex'ors*, and the donee was a voluntary Virginia association for the education of Virginia youths, it is not perceived why the bequest would not be valid under the statute we are discussing.

Supposing a valid donation or conveyance under the statute for educational purposes, who is to appoint and direct the *particular uses* to which the trust property is to be applied?

By the sixth section of the act of 1841 (acts 1841-'42, chap. 26, p. 52) it is provided, that the property is to be taken and held by the trustees there named, "to be disposed of *in manner and form, to all intents and purposes, as such donor or testator or testatrix may have prescribed*."

In the revision of 1849 this section was combined with the act of 1839, digested and put into the Code; and in regard to the particular provision of the act of 1841 just quoted, though the phraseology as it is in the Code is somewhat changed, the change was evidently made for the sake of brevity only. The rule of construction as to the Code is, that the old law is not to be regarded as intended to be changed unless such intention plainly appears in the Code. *Parramore v. Taylor*, 11 Gratt. 242. See also *Roy's ex'ors v. Rowzie*, 25 Gratt. 610 (top).

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The language in the Code (section 3) is, that "it [the property] shall be taken and held for the *uses prescribed by the donor, grantor or testator,*" etc., that is, in substance, that the *wishes* of the *donor*, etc., shall be carried out, as *he has declared them*. In other words, if the conveyance be for education, the founder of the trust shall have the right to prescribe what that education shall be—what shall be taught, who shall be taught and how, who shall teach, etc., etc.

The gift, grant, devise or bequest may be to the board of education, or *any other corporation*, county or natural person, as trustee (section 3). As to the power given to corporations to hold as trustee, the statute merely affirms the rule that already existed independently of statutory authority, as may be seen by reference to *Vidal v. Girard's ex'ors*, 2 How. 188–190; *Perin v. Carey*, 24 How. 505.

It would seem to be the intent to protect this favored charity, not only against the hazard of failure, but against perversion and abuse, and to that end the general assembly takes the superintendence and control of it, in a measure, upon itself as *parens patriæ*.

In case of donation by will, the *Attorney-General for the Commonwealth*, in the name of the *Commonwealth*, is required to "institute all necessary proceedings to have such will admitted to record." Section 4.

Where no trustee has been appointed, or the trustee dies or refuses to act, it is made the *duty of the Attorney for the Commonwealth* to make a motion to the court for the appointment of trustees. The trustees "may sue and be sued in the same manner as if they were trustees for the benefit of a certain natural person," and "for enforcing the execution of the trust a suit may be maintained in the name of the *Commonwealth*, where there is no other party capable of prosecuting such suit." Section 5.

Here then is a contingency in which the *Commonwealth* undertakes to enforce the execution of the trust, and it will, in the exercise of its sovereign power, enforce it as the lord chancellor

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of England enforces charitable trusts by virtue of the prerogative of the Crown delegated to him for that purpose.

Nay more, in case of a *devise* or *bequest*, the legislature reserves to itself the right at any time to *suspend* or *repeal the authority* given by the second section; and in case of such suspension or repeal, it is required to "provide that the subject of such devise or bequest shall vest or be vested in such person, his heirs, executors or administrators, as would have been entitled had the devise or bequest not have been made." Sect. 10.

Recurring to section 2, some embarrassment in the construction grows out of the words in parenthesis "(other than for the use of a theological seminary)" being placed in the wrong connection. This parenthesis—"an exception to an exception," says Judge Moncure in *Roy's ex'or v. Rowzie*—ought never to have been in the section in its present form. As the limitation stood in the act of April 2, 1839, § 7 (Acts 1839, ch. 12, p. 13), it was in the appropriate form of a proviso, and was perfectly free from ambiguity. The revisors intended to embody the same idea in the condensed form of an exception in parenthesis and endeavoring to be brief became somewhat obscure.

Strike out the parenthetical marks and the words included within them and add a proviso of the same import at the end of the section, and it will read thus: "2. Every gift, grant, devise or bequest which, since the second day of April, in the year one thousand eight hundred and thirty-nine, has been, or at any time hereafter shall be, made for literary purposes, or for the education of white persons within this State, and every gift, grant, devise or bequest, which, since the tenth day of April, in the year one thousand eight hundred and sixty-five, has been, or at any time hereafter shall be, made for literary purposes, or for the education of colored persons within this State, whether made in either case to a body corporate or unincorporated" (then pursuing the language as it runs in the section to the end): Provided further, that nothing in this act contained shall be so construed as to give validity to any gift,

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grant, devise or bequest to or for the use of any unincorporated theological seminary. (See the proviso in section 7 of the act of 1839—Acts 1839, p. 13).

The word “unincorporated” is inserted to meet the construction in *Roy's ex'or v. Rowzie*.

The section thus constructed, conveys precisely the meaning, as we understand it, intended to be conveyed by the section as it now stands, and there is no ambiguity in it.

Let us now see whether the bequests, which are the subject of controversy in this case, if given to the appellant *in trust* (which we do not admit), are valid under the provisions of the Code, which have been considered.

The trustee is certain (if uncertain, or there was no trustee, it would make no difference)—the subject (the property given) is certain—the beneficiaries are uncertain, that is, they belong to a defined *class* of persons, but the *particular individuals* of that class, who are to be the beneficiaries, are not pointed out. Nor is it at all necessary that it should be. The statute is clear upon this subject. The beneficiaries are “poor young men.” This is the description the testator gives of the objects of his bounty. It is the duty of the trustee to select from this class, and a court of equity would compel the selection to be made. See Freeman's note to *Bridges v. Pleasants*, 44 Amer. Dec. 100, and cases there cited. We have not space to give extracts from the opinions of the judges in these cases, but the court is asked to examine them. We need not, however, go outside this State for precedents on this point. The court is referred particularly to the will of Samuel Miller for the establishment of a manual labor school for *poor white children* of the county of Albemarle, and the construction of and effect given to it in *Kinnaird v. Miller's ex'ors*, 25 Gratt. 107.

The benefit the testator intends to confer upon these “poor young men,” and through them upon society and the world, is *education*. No man of the meanest capacity, who reads Dr. Churchman's will, will deny this. His language is, “said be-

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quest to be used exclusively for *educating* poor young men," &c., and our statute law gives effect to every gift, grant, devise or bequest "for the *education* of persons within this state," except a gift, grant, devise or bequest to or for the use of an *unincorporated* theological seminary.

But it is argued, and such we infer from the decree was the opinion of the learned judge of the circuit court, that the education prescribed by the testator in his will was not *the* education contemplated by the statute. What is the education the will directs? Education of poor youths for the highest of callings—ministry in our holy religion. Can it be true, that this kind of education and only this is excluded from the broad charity established by our law, and excluded too because "*religious* in its character?" If so, woe to the commonwealth! But, we insist that the law is not obnoxious to this reproach. It is "education" in its widest sense, without limitation or qualification as to kind or character, for the support of which the commonwealth encourages her people to bestow their bounty. The language of the law is broad and comprehensive, and, taken in reference to the great public charity designed to be fostered, admits of no such narrow construction as has been placed upon it. To be sure, it would seem, the learned revisors of 1849, in this particular displaying greater fear of the church than of its powerful adversary, were disposed to except "religious education" in express terms from the general objects intended to be favored and promoted. In their *parenthesis*, to the words, "other than for the use of a theological seminary," they added "or purposes of religious education." Report of Revisors, 421. These latter words, the legislature, revising the revision, *struck out*, thus clearly manifesting the intention not to exclude "religious education" from the general provisions of the law. True, the words "other than for use of a theological seminary" were retained. Whether it was wise to retain them or not, it is bootless for the court to enquire. They are retained, and effect must be given to them. But the restriction applies only to donations

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to or for the use of an *unincorporated* theological seminary *eo nomine*. It has this extent and no more, and the bequests in the present case were not to or for the use of a theological seminary, either incorporated or unincorporated. Even this limited restriction is now of no practical importance. There are but two theological seminaries in this state, so far as we know, and both are now incorporated—"The Trustees of Protestant Episcopal Theological Seminary and High School in Virginia," and "The Trustees of the Union Theological Seminary in the county of Prince Edward"—the former a Protestant Episcopal seminary, and the latter Presbyterian. The former was incorporated February 28, 1854 (Acts of 1853-54, ch. 107, p. 65), and the latter December 20, 1855 (Acts of 1855-56, ch. 277, p. 190). The original charters of the two institutions are very much alike in their general provisions—both are empowered to take and hold real and personal estate to a large amount for their corporate purposes. The Episcopal seminary is limited to the amount of two hundred and fifty thousand dollars in money and chattels, and two hundred and fifty acres of land. The limit in the original charter of the Union theological seminary was the same, but the charter was amended January 9, 1867 (Acts 1866-67, ch. 44, p. 506), extending the amount of money authorized to be acquired to five hundred thousand dollars, and restricting quantity of land to be held to two hundred acres.

The incorporation of these two seminaries, within a few years after the revision of the laws in 1849, shows a very decided abatement of the fears implied by the *parenthesis*, and, in fact, if that exception ever had any value, it has little or none now.

But it is further argued, that the trust (if trust it be) created by the will is too vague and indefinite to be enforced in a court of equity, and is therefore void.

We have said all we intend to say as to the beneficiaries. The education they are to receive is "for the Episcopal minis-

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try upon the basis of evangelical principles as now established." What "Episcopal ministry" is meant here? is asked. The answer is plain. It is admitted that there are several Episcopal churches—the "Protestant Episcopal," the "Reformed Episcopal" and the "Methodist Episcopal." An "Episcopal ministry," may be predicated of each. That is so, but the real question is, what did the *testator* mean by these terms when used by *him*. This is an instance in which the expounder of the will may resort to extrinsic evidence to aid in the interpretation—not to determine what language the testator may have intended to employ, but the meaning of that which he did employ. To this end, we may look to the situation of the testator, his relation to the objects of his bounty, and indeed to all the circumstances surrounding him, known to and understood by him, and likely to have influenced him in the disposition of his property. *Wootton v. Redd*, 12 Gratt. 196, and cases cited. Looking to these, as we have the right to do, can any man doubt what "Episcopal ministry" the testator meant? He was a member and communicant of the Protestant Episcopal Church at the time he made his will and when he died. The bequests are to The Trustees of the Protestant Episcopal Education Society in Virginia—these trustees being the bishop, assistant bishop, twelve clergymen and ten laymen of the Protestant Episcopal Church—the society meant is declared in the will to be that for which Bishop Whittle takes up collections in his annual visitations—Bishop Whittle being the bishop of the Protestant Episcopal Church in the diocese of Virginia. Reading the will by the light of these facts, the meaning of the words "Episcopal ministry," as used by the testator, cannot be mistaken.

"Evangelical principles as now established," what are they? They are, as the words are used by the testator, what they are proved to be in this case. Dr. Hanckel, who has knowledge in such matters, tells us what they are. No proof is offered to show that they are different from what he, in his deposition,

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declares them to be. They are the principles held and taught by the Protestant Episcopal Church in Virginia, for the education of whose ministry particularly the testator designed his bounty. It may be admitted, that clashing views may be entertained by different persons as to what constitutes "evangelical principles." Shall the legacy fail for that reason? If so, temporal rights connected with religious faith and practice can seldom, if ever, be enforced by the courts. Questions involving such rights are constantly coming before the civil courts. They are often difficult of solution, but the courts uniformly adjudicate them as well as they can. They do not decline to decide them merely because difficult. There are many such cases in the books. In Virginia, as has been seen, land of a limited quantity may be given to trustees for the use of a religious congregation as a place of public worship. Who constitute that congregation? They are the members, but *who* are the members? "To constitute a member of any church, two points at least are essential, without meaning to say that others are not so, a *profession of its faith* and a submission to its government." This is quoted with approbation from the opinion in *Den v. Bolton*, 7 Halst. (New Jersey) 215, by Judge Daniel delivering the opinion of the court in *Brooke v. Shacklett*, 13 Gratt. 320. In such cases, the court is or may be compelled to decide what is the religious faith of a particular church, and where, as is generally the case, there are differences of opinion as to what that faith is, very great difficulty may be experienced in determining what it is, but still the court must and does decide.

We submit, that education for the ministry in the Protestant Episcopal Church on the basis of evangelical principles as now established, *treated as a trust under our statute* is not too uncertain and indefinite to be enforced. The very object of the statute is to give effect to indefinite trusts that would be void in Virginia without statutory authority. It was never intended that such trusts should fail merely because indefinite, as we

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think we have already shown in construing the provisions in the Code. *The Commonwealth herself* will take care that they are enforced, and if they cannot be or ought not to be enforced, *she* reserves to *herself* the right to vacate them and revest the trust property in the donor and his representatives. Sec. 10, ch. 77, Code of 1873.

The fact conceded, as must be, that our statute, so far as it respects gifts for purposes of education, was intended to be substituted for the statute of Elizabeth, we are required to apply to it the same liberal rules of construction as the English statute received and the same principles in upholding and enforcing the trust. Such a trust is never permitted to fail however indefinite. See the numerous cases cited in the text-books referred to at the commencement of this note, particularly the opinion of Chief Justice Shaw in *Going v. Emery*, 26 Amer. Dec. 645, and what is said by Justice Gray in *Russell v. Allen*, 107 U. S. 167.

It is further argued by counsel of appellees in their note (p. 3), that the language of the statute clearly restricts its operation to the education of persons "within this State," and that "the testator, Dr. Churchman, *does not* restrict his gifts to the education of persons within this State."

The alleged restriction in the statute is admitted, but we deny that the gifts of the testator contravene the particular provision of the statute imposing the restraint. It is true, that he does not say in *express* terms that the recipients of his bounty shall be citizens of the State—persons "within the State"—nor is it at all necessary that he should have so said in terms. It is sufficient if his intention to that effect can be reasonably inferred or justly implied. The gift, whether absolute or in trust, is to a corporation created by the State for State purposes, namely, for the purposes of education and aiding in education, presumably (and the presumption is conclusive), for the benefit of the State and persons within it, and the conduct of the corporation has been in conformity with its charter. The testator,

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who was a member and communicant of the Protestant Episcopal Church and a citizen of the State, must be taken to have known those things and to have intended that his gifts should be applied to the education of "persons within the State."

It seems to be assumed, that a donation by a citizen of Virginia, to a trustee domiciled in Virginia, whether that trustee be a corporation or natural person, for the purposes of education, is void under the statute, unless it appears affirmatively and expressly on the face of the instrument that the intended education is confined to "persons within the State." We understand the rule of construction in such a case to be just the reverse. The cardinal principle in the construction of every instrument is, so to construe it *ut res magis valeat quam pereat*—that it shall have some effect, if possible, rather than none—that, if lawful, it shall be upheld rather than defeated. And where an instrument fairly admits of two constructions, one of which is agreeable to law and the other is not, the former is to be preferred. 2 Minor's Insts. (3d ed.) 1067; and so, where it is susceptible of two constructions, the one working injustice and the other consistent with the right of the case, that one should be favored which standeth with the right. *Noonan v. Bradley*, 9 Wall. 407; *Bank of Old Dominion v. McVeigh*, 32 Gratt. 542.

Consistently with these maxims, when the testator gives property to a corporation of this State, to be applied to the education of a defined *class* of persons, without declaring in so many words, that the persons to be educated shall be "persons within the State," it must be taken, in the absence of evidence to the contrary, that he intended his bounty for those persons, who alone under the law could enjoy it. In other words, unless the instrument on its face plainly shows an intention to extend the bounty to persons outside the State, it is to be construed as intended for those within the State, in conformity with law.

Virginia v. Levy, 23 Gratt. 21, is cited and relied on by counsel of appellees. We submit, that it decides nothing pertinent

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to the case in hand. In that case, the testator, Uriah P. Levy, a citizen of New York, by his will gave the residuum of his estate, including Monticello, in Virginia, the late residence of Mr. Jefferson, first to the people of the United States in trust for the establishment and maintenance, at Monticello, of an agricultural school, for the purpose of educating as practical farmers, *the children of warrant officers of the United States, &c.* If the United States declined to accept the trust, he gave the property, on the same trusts, to the state of Virginia. In a suit in the state of New York by the executors, asking the instructions of the court in the administration of the estate, to which suit the United States was a party and Virginia was not, the New York court held the trust void. The court of appeals, in a suit brought in Virginia for the partition of Monticello, to which Virginia was made a party, held that the decree of the New York court was conclusive upon Virginia. A question was made in argument whether the devise to Virginia was not void because, as alleged, it did not come within the operation of our statute, which, as the law stood in 1862, when the testator died, provided only "for the education of *white* persons *within this State.*" The court *expressly waived* the decision of this question, declaring however that it was *strongly inclined* to the opinion that the devise was void, because it extended to persons without regard to race, complexion or residence. While this expression of a *strong inclination towards* an opinion upon a question, the decision of which was *expressly waived*, has not the semblance of authority, it may be conceded for the purposes of the present case, that the *inclination* of the court may have been right, for the will showed *on its face*, or tended to show, that the gift was intended for the benefit of persons not within the State—"the children of warrant officers of the Navy of the United States." There is no expression in the will of Dr. Churchman that shows or even tends to show any intention to extend his bounty to non-residents, and the court will not impute to him an intention which he does not express, particularly when the

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surrounding circumstances serve to show a contrary intention. A few words only, and the case will be submitted, so far as the writer is concerned.

The change in the policy of the State in regard to both religious and educational uses within the last thirty or forty years has been marked. The legislation initiating the change commenced, as has been seen, in 1839, and has been advancing gradually to this time. Our highest court, in its decisions, has kept pace with the legislature. The charities, whether religious or educational, have been sustained in almost every case that has come before that court since 1839. Bequests for education were upheld under the act of 1839 in *Kelly v. Lorc's adm'r*, decided in 1870, and under ch. 80, Code of 1849, in *Kinniard v. Miller's ex'or*, decided in 1874. Religious uses were sustained in *Brooke v. Shacklett*, in 1856, and *Hoskinson v. Pusey*, in 1879. Bequests to religious corporations were upheld in *Roy's ex'or v. Rowzie*, in 1874, in *Missionary Society v. Calvert's adm'r*, in 1879, and in *Cozart v. Manderville's ex'or*, in the same year. In *Virginia v. Lery*, decided in 1873, there was no decision; as has been seen, except to follow the decree of the New York court of appeals, on the principle of *res judicata*. In *Seaburn's ex'or v. Seaburn*, decided in 1859, the devise was decided to be invalid as not within the statute allowing *congregances* of land for the use of a religious congregation. It has been shown, that in *Stonestreet v. Doyle*, decided in 1881, the devise declared to be void was under the will of a testator who died before the year 1839, when the first enabling act was passed. In *Roy's ex'or v. Rowzie* the bequest was to a Baptist Theological Seminary in South Carolina incorporated by that State, in *Missionary Society v. Calvert's adm'r* to a Methodist Missionary Society incorporated by New York, and in *Cozart v. Manderville's ex'or* to an Episcopal Missionary Society incorporated by the same State. And in reference to the case last named, it is to be observed, as the record shows, that the society incorporated embraced every member of the Protestant Episcop-

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pal Church in the United States! The argument was made, that it could not take the bequest of a Virginia testatrix, because it was against the policy of the State—that it was an incorporation of a *church*, which was forbidden by the Virginia Constitution, Art. 5, § 17. But the argument did not prevail, and the legacy was held valid. See Judge Anderson's opinion.

And here it may be remarked, that of the three cases decided by the court of appeals prior to the act of 1839, in two of them, *Janney v. Latane* and *Literary Fund v. Dawsons*, if they had arisen under the existing statutes, the bequests would have been sustained, for they were for educational purposes. *Gallego v. Attorney-General*, being a case of a bequest for *indefinite religious* objects would, it is supposed, be decided now as it was decided in 1832. In that respect, it stands alone.

Under this course of decision, we may well ask, is Dr. Churchman's will to be made an exception?

We do not hesitate to say, in conclusion, that the case submitted is, in our judgment, the most meritorious in the long line of Virginia cases which have been referred to, and the gift of the testator for the highest and holiest of purposes ought not to be defeated, unless its invalidity is established in the clearest and most satisfactory manner, and if there be a doubt about it, that doubt should be solved in favor of the charity.

George M. Cochran and J. H. McCue, for the appellees.

RICHARDSON, J., delivered the opinion of the court.

The object of this suit was to have a judicial construction of the will of the late Dr. Henry J. Churchman, of Staunton, in respect to certain bequests therein contained, and a settlement of the estate of the testator, who died unmarried and childless.

By the 1st, 2d and 3rd clauses of his will, after the usual provisions as to burial expenses and the payment of debts, the testator bequeathed his gold watch and chain and his library to his

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sister, Virginia M. Churchman. And by the 7th clause he also gave to his sister, Virginia M. Churchman, \$4000, absolutely; and by the same clause he gives to his sister, Fannie Cosby Geiger, and his brother, John S. Churchman, each one dollar.

By each of the 4th, 5th and 6th clauses of the will, a specific legacy is given to the appellant corporation; and by the 8th clause, it is made residuary legatee. The 4th clause reads; "Four thousand dollars of my remaining estate shall go into the hands of a guardian or trustee, as may at the time be deemed best by the court, for my niece, Alice Clark Churchman, daughter of Dr. V. T. Churchman, dec'd, to be invested in some safe, permanent interest-bearing fund, so that the semi-annual or annual dividends arising therefrom shall go to the support and education of the said Alice Clark Churchman, until she is twenty-one years old, when this same fund, if not already in the hands of a trustee, shall then go into the hands of a trustee, to be invested as before, in some safe, permanent interest-bearing fund, that she, Alice, may receive for her sole and separate use, notwithstanding any marriage she may contract. the interest-bearing dividend that may accrue semi-annually or annually on the fund for her benefit as long as she may live. In no case, however, shall the principal sum of four thousand dollars be diminished. The guardian and the trustee shall give ample security, under the direction of the court, for the amount intrusted. At the death of the said Alice Clark Churchman, whenever that may be, the principal sum of four thousand dollars, and any unexpended interest, shall be paid to The Protestant Episcopal Education Society of Virginia, said bequest to be used exclusively for educating poor young men for the Episcopal ministry, upon the basis of evangelical principles as now established."

By the 5th and 6th clauses, \$3000 is directed to be set apart for the support and education of each of two nephews of the testator, until they are respectively twenty-one years old, or shall die, when the said sums shall go at once into the hands of

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"The Protestant Episcopal Education Society in Virginia," to be used under precisely the same restrictions and for the same purposes mentioned in the 4th clause, ample security being required of the trustee and guardian in each case.

The testator accurately describes the legatee corporation in the 5th and 6th causes of his will, whilst, in the 4th and 8th clauses, there is a slight misdescription, it being in the latter, "The Protestant Episcopal Educational Society of Virginia," when in the former it is accurately described as "The Protestant Episcopal Education Society in Virginia." But this is wholly immaterial when we look to the 8th clause, where the residuum is given to the same society, "to be used under the same instructions, and for precisely the same purposes, *as the preceding bequests to the same society.*" And for still greater certainty the testator adds: "To more fully identify, beyond mistake, the society I mean, I state that it is the same for which Bishop Whittle, of Virginia, is now and has been for years collecting in his usual visitations."

The only question to be determined by this court is, whether the bequests to this corporation are valid. The circuit court of Augusta county, by its decree, held them to be null and void. *The decree rests upon two grounds*, neither of which can be maintained upon principles applicable to the case.

The first proposition announced in the decree is, that the bequests to the corporation were not absolute "for its own use as a corporate body." 2d. That "the same were given to said corporation in trust to be exclusively used for the purpose in the will named, that the uses and trusts declared by said testator are null and void, because said trusts are religious in their character, and too vague and indefinite to be upheld under the law of this state or to be administered by a court of chancery, even if said trusts were merely educational, as contemplated by § 2, ch. 77, Code of Virginia, 1873." These propositions will be examined in the order stated. The first proposition, that the bequests to this corporation are not absolute, though it does

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not in terms so state, necessarily imports, and correctly too, that if absolute the gift would be valid; but assumes the further proposition that a corporation, as such, is incapable of taking and holding property by devise or bequest upon the trusts and for the uses indicated by the testator. Upon principle and authority the proposition is wholly untenable.

Formerly the law was that corporations could not be seized of lands and other property to the use of another, and could not be trustees. The reason for the rule was found to be too artificial for the substantial demands of society, and has long since been rejected as insufficient; and now the well-established doctrine is that corporations of every description may take and hold estates, as trustees, for purposes not foreign to the objects of their creation and existence; and they may be compelled by courts of equity to carry the trusts into execution. *Perry on Trusts*, § 42, and numerous authorities there cited.

As a proper qualification to the general rule above stated, Mr. Perry calls attention to the fact that corporations are the creatures of the law, and that as a general rule they cannot exercise powers not given to them by their charters. And he says: "For this reason they cannot act as trustees in a matter in which they have no interest, or in a matter that is inconsistent with, or repugnant to, the purposes for which they were created. Nor can they act as trustees if they are forbidden to take and hold lands, as by the statutes of *mortmain*, nor if they are not empowered to take the property. But if the trusts are within the general scope of the purposes of the institution of the corporation, or if they are collateral to its general purposes, but *germain* to them, as if the trusts relate to matters which will promote and aid the general purposes of the corporation, it may take and hold, and be compelled to execute them, if it accepts them." *Ib.* § 43; and *Vidal v. Girard*, 2 How. 188-190, and authorities there cited.

It might well be held, in this case, that the bequests are to the corporation for *corporate purposes*, and that the corporation,

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in respect thereto, is a trustee only in the general sense that every corporation is a trustee of the powers and franchises with which it is invested for the purposes of its incorporation. In effect there is unquestionably a trust here, though not expressly declared in terms. It is immaterial whether it is so declared or not if, as here, in the nature of things a trust is created; nor is it material whether the trust is to be executed by the corporation in virtue of its corporate authority, or by it as expressly constituted trustee for the purpose, if the trust is within the scope of the purpose for which the corporation was created and for which it exists. In either case the purpose of the trust is obligatory, and its execution will be enforced if necessary. The case, then, may be treated in the light of an express trust, and, as such, falling either in the scope of the authority vested in the legatee corporation by its charter.

We must keep in view the rule, too well established to be questioned, that a devise or bequest to a corporation in trust, if otherwise valid, is not for that reason void. Tested by these principles, why may not this corporation take the bequests to it in trust, and execute the use prescribed by the testator? We know of no reason why it may not.

The law which must control this case is found in sections 2 to 10, chapter 77, Code 1873, especially in said second section, which is in these words: "Every gift, grant, devise or bequest which, since the second day of April, in the year one thousand, eight hundred and thirty-nine, has been, or at any time hereafter shall be made for literary purposes or for the education of white persons within this state (other than for the use of a theological seminary), and every gift, grant, devise or bequest which, since the tenth of April, in the year one thousand, eight hundred and sixty-five, has been, or at any time hereafter shall be, made for literary purposes or for the education of colored persons in this state (other than for the use of a theological seminary), whether made in either case to a body corporate or

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unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person," &c. The provision in respect to colored persons was incorporated into the law, as found in the Code of 1873, by virtue of an act passed March, 1873 (see Acts '72-3, ch. 265, p. 243).

The law on the subject found in the Code of 1873, is the embodiment of two acts—one passed on the 2d day of April, 1839 (see Acts 1839, ch. 12. p. 1); and another act passed on the 10th day of March, 1841 (Acts 1840-41, ch. 26, p. 52). At the revision of the laws in 1849, these two acts, without any material change, were revised and combined, and made to constitute chapter 80 of the Code of 1849, and now found in chapter 77 of the Code of 1873.

Such being the law in force on the 8th day of January, 1875, this society was incorporated by the name of "The Trustees of the Protestant Episcopal Education Society in Virginia." It is in proof that the trustees (the incorporators) were two bishops, twelve clergymen and ten laymen of the Protestant Episcopal Church in the Diocese of Virginia. These were constituted, by their charter, a body politic and corporate by the name and style of "The Protestant Episcopal Education Society in Virginia," with perpetual succession and a common seal; with capacity to sue and be sued, plead and be impleaded; and with power to receive, hold and purchase, to them and their successors forever, lands and tenements, money and other chattels, and dispose of and manage the same. The declared object of the society (§ 2 of charter) is "the education, or aiding in the education of such young men, as in the judgment of the said trustees or their successors, or of any executive committee duly appointed by them, shall seem best." Not only is it a corporation made legally capable of taking and using property and money for educational purposes, but the power of selection and appointment is conferred; poor young men are to be the recipients, and they to be selected in the way pointed out in

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the charter. The bequests in question are in terms for the education of poor young men. So far, this certainly falls within the scope of the purpose of the corporation—the sole purpose for which it was created—education without restriction or limitation as to any particular kind. This is incontrovertibly so, unless it can be shown that a poor young man pursuing a course of theological instruction is not being educated. Surely no intelligent person will assert a proposition so palpably absurd.

Thus, as the corporation was created solely for educational purposes, and the donation is for the same purpose, and clearly within the corporate purpose of the society, in no way contravening any right or duty of the society, there can be no reason why it may not take and hold, as expressly constituted trustee for the purpose, the bequests of the testator, and apply them to the use specified, unless in other respects the bequests are invalid.

It is a gift to charitable uses, not in contravention of any statute, or of public policy. The sum given is certain; the corporation to take is thoroughly identified, and the use, falling within the purpose of the creation of the corporation, is distinctly defined. The right of appointment or selection still resides with the corporation. The direction by the testator as to how his gift is to be applied, in no manner interferes with or runs counter to the chartered right of the corporation to select the beneficiaries. The familiar rule is, that courts of equity treat that as certain which is capable of being rendered certain. It is obvious that there is no difficulty in the way in this respect. The corporation is not only willing, but stands here imploring a court of equity to protect it in its right to take, and hold to the use specified. The corporation has the legal capacity to take the bequests as given, and its right to do so must be upheld and enforced. This it is entirely competent for a court of equity to do.

2d. We come now to the second proposition announced in the

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decree of the circuit court, to-wit: That the bequests are given to said corporation *in trust*, to be exclusively used for the purposes in the will named—that the uses and trusts declared by the testator are null and void, because said trusts are religious in their character, and too vague and indefinite to be upheld under the law of this state, or to be administered by a court of chancery, even if said trusts were merely educational, as contemplated by section 2, ch. 77, Code 1873. The consideration of this proposition necessarily involves the doctrine of Charitable Uses or Trusts.

Many definitions or attempted definitions are found in the books, only a few of which will be given here.

In *Jackson v. Philips*, 14 Allen, 156, it was said, "A charity, in a legal sense, may be more accurately described as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable."

In *Ould v. Washington Hospital*, 95 U. S. 311, Mr. Justice Swayne said: "A charitable use, when neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing or well-being of social man."

In *Russell v. Allen*, 107 U. S. 167, Mr. Justice Gray said: "They (charities) may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity."

In *Old South Soc. v. Crocker*, 119 Mass. 23, it is said: "To give it (a gift) the character of a public charity, there must ap-

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pear to be some benefit to be conferred upon, or duty to be performed towards either the public at large or some part thereof, or any indefinite class of persons."

In *Fontain v. Ravenel*, 17 How. 384, Mr. Justice McLean says: "In the books, it is said, the thing given becomes a charity when the uncertainty of the recipients begins. This is beautifully illustrated in the Jewish law, which required the sheaf to be left in the field for the needy and passing stranger."

In *Perry on Trusts*, § 701, referring to the fact that the English statute, 43 Elizabeth, makes no reference to religious uses except the "repair of churches," it is said: "But in a Christian community of whatever variety of faith and form of worship, there would be little need of a statute to declare gifts for religious uses to be charitable. Therefore, both before and since the statute, gifts for the advancement, spread and teaching of Christianity, or for the convenience and support of worship, or of the ministry, have been held charitable."

From the definitions and descriptions of "charities" found in the text-books, and the illustrations furnished by decided cases, there is no reasonable ground to doubt that the bequests to this corporation, even if given for purposes not embraced by its charter, if not repugnant thereto, are in a legal sense charitable trusts. See *Vidal v. Girard*, 2 Howard, 127, and authorities cited.

In the first branch of the second proposition contained in the decree of the circuit court, it is declared that the bequests in this case are null and void, because religious in their character. Can this be considered a valid objection in Virginia? Clearly not, unless, as would seem to be implied in the objection, it be true that religion and religious education are under the ban of government in Virginia. No decision of the court of last resort in this state has gone to the unreasonable extent of holding that a charity for religious uses is, for that reason, void. Even *Gallego v. Attorney-General*, 3 Leigh, 450, (presently to be examined) stops far short of deciding any such

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proposition. An examination of all the Virginia cases will show that whenever a charitable trust, though for religious uses, has been declared to be void, it has been, not because "religious in its character," but because, and only because *too indefinite to be executed by the courts*. We have seen that in the 2d section of chapter 77, Code 1873, the only exception is "for the use of a theological seminary." In the acts, as they stood prior to the revision of 1849, this exception was in the form of a proviso. In the revision of 1849, the acts of 1839 and 1841 were revised and combined, and together, as before stated, constituted chapter 80 of the Code of 1849, the proviso being then put in parenthesis, and with the words in parenthesis, "other than for the use of a theological seminary," the revisors reported the additional words, "or purposes of religious education." Report of Revisors, 421. These latter words the legislature deliberately struck out, and in doing so, in effect, declared that religious education should not be embraced in the exception, and should not be excluded from the general provision of the law in favor of education. See *Robertson v. Clifton, Judge*, etc., July number, 1881, of the Virginia Law Journal. In that case Staples, J., said: "When the framers of that instrument [the constitution] deliberately omitted the disqualifying clause affecting the commonwealth's attorney, without substituting others in their place, we must suppose it was intended that this disqualification *should thereafter cease*." See also other authorities on the subject referred to in *Burks v. Hinton*, 77 Va. 35, 36 and 37. It cannot be necessary to further consider this objection. It is opposed to the letter and spirit of our constitution, which guarantees protection to every religious faith and creed. There is something in the objection itself more suggestive of the insidious workings of infidelity, than of the true spirit of christian forbearance, love and charity enjoined upon all by our constitution.

But it is insisted in argument that the bequests of Dr. Churchman to the legatee corporation, "to be used exclusively for edu-

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cating poor young men for the Episcopal ministry," are void at common law; and it is said that this is clearly established in Virginia, upon the authority of *Gallego v. Attorney-General*, 3 Leigh, 450; *Brooke v. Shacklett*, 13 Gratt. 301; *Seaburn v. Seaburn*, 15 Gratt, 423; and *Baptist Association v. Hart*, 4 Wheat. 1. And it is further said that there is no ground upon which this case can be brought within the principles laid down in the leading case of *Ingles v. Sailor's Snug Harbor*, 3 Peters, 99, followed in Virginia by *Literary Fund v. Dawson*, 10 Leigh, 147; *Miller's Case*, 25 Gratt.; and *Stonestreet v. Doyle*, 75 Va. 364; whereby the doctrine was held that a charitable bequest to a corporation thereafter to be created, may be enforced as an executory devise.

As to the cases last named, it need only be remarked, that there is in this case no occasion to discuss the doctrine in respect to executory devisees as applied in these cases, or in any other respect. That doctrine can have no application here, as in this case, when the testator's will was made, and when he died, the legatee corporation was in existence and fully equipped with legal capacity to take, hold and use, for the identical purpose for which the testator made the bequests.

Let us, however, recur to the proposition contended for, that the bequests in this case are invalid, upon the principles of the common law.

In entering upon this enquiry, one of grave public importance, it becomes proper to review the doctrine laid down in *Gallego v. Attorney-General*. This, however, will be done, not because it is essential to a proper determination of the question here involved, but because that case is confidently relied on as governing this case, and because the public interest demands that the doctrine laid down in that and certain later cases, the same way, should be definitely settled, at least in so far as it is affected by legislation subsequent to that decision.

In Virginia, it may be truly said, in respect to the doctrine laid down in *Gallego v. Attorney-General*, not exactly what is un-

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derstood by the maxim, "*communis error facit jus*," but that, for a long time, that doctrine has been the only foundation in this state for the "common error," in respect to charitable trusts. In Brown's Legal Maxims, at page 124, Lord Dunmore, C. J., when delivering judgment in the house of lords, in a case involving some very important legal and constitutional doctrines, is quoted as saying, "that a large portion of that *legal opinion* which has passed current for law, falls within the description of 'law taken for granted;' and that, when, in the pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and re-statement of a doctrine * * * cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."

That the doctrine in question was laid down in Virginia by competent authority no one will deny; but it is a doctrine that did not have its judicial birth in Virginia, but was an error copied from the supreme court of the United States, in which court it has long since been repudiated as palpable error, though, to some extent, it has still been persisted in here.

After the supposed repeal, in 1792, of the statute of charitable uses (43 Elizabeth), the question arose whether such trusts, as a class distinct from ordinary trusts, any longer existed in Virginia, and could still be supported on the peculiar principles which had theretofore been applied to them. The question first arose in the case of the *Philadelphia Baptist Association v. Hart's ex'ors*, 4 Wheat. 1, and the court being divided on the question, the case was certified to the supreme court of the United States, and was by that court, in 1819, decided adversely to the trusts declared by the testator in that case.

The points distinctly decided in *Baptist Association v. Hart*, were: 1st. That the association not being incorporated at the testator's decease, could not take the trust as a society. 2d. That the bequests could not be taken by the individuals who composed the society at the death of the testator; and 3d. That

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there were no persons to whom this legacy, were it not a charity, could be decreed.

True, it was strongly intimated by Chief Justice Marshall, in his opinion, that charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a court of equity, enforcing the prerogative of the king, as *parens patriæ*, independently of the statute of 43 Elizabeth. But this doctrine was denied by Chancellor Walworth in *Potter v. Chapin*, 6 Paige, 649; and it has been since conclusively proved by an overwhelming array of authorities, that the court of chancery exercised jurisdiction over charities anterior to the statute of Elizabeth, and upon the common law. See *Vidal v. Girard's ex'rs*, 2 How. 196 (decided in 1844), and numerous authorities there cited.

The question next came up in Virginia, in 1832, in the case now under review, of *Gallego v. Att'y-General*, in the decision of which case the doctrine laid down in *Baptist Association v. Hart* was simply adopted and followed. Judge Carr, who seems to have delivered the opinion of the court, after a very brief statement in reference to the question of charities involved, dismissed the subject with the remark: "I certainly shall not discuss it; for I find this completely done to my hand by Chief Justice Marshall, in the case of the *Baptist Association v. Hart's ex'rs*." And Judge Carr, by way of conclusion, added that the authorities cited, and the reasons given by Chief Justice Marshall proved conclusively to his mind "that in England charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the king as *parens patriæ*, independently of the statute of 43 Elizabeth; and as that statute, if ever in force here, was repealed in 1792, I conclude that charitable bequests stand

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on the same footing with us as all others, and will alike be sustained or rejected."

Such was the real decision in *Gallego v. Attorney-General*, and such the reasons therefor. It was, as Judge Carr's language expressly shows, but the adoption of the views expressed by Chief Justice Marshall in *Baptist Association v. Hart*. That the reasoning of Chief Justice Marshall on the authorities and lights before him was entitled to the highest respect no one will question; but in the light of subsequent and thorough examination, it has been established beyond controversy that the authorities relied on by that great judge and his conclusions drawn therefrom were founded in error. See *Vidal v. Girard*, *supra*, and authorities cited.

After *Gallego v. Attorney-General*, came the decisions by this court of *Janney v. Latane*, 4 Leigh, 327, and *Literary Fund v. Dawson*, 10 Leigh, 147, which were the same way; and to the same effect have been numerous decisions of this court, not affected, however, by the legislation subsequent to the decision in *Gallego v. Attorney-General*, the last case being that of *Stone-street v. Doyle*, 75 Va. 356.

Perhaps in no case ever before the supreme court of the United States was there more depth of research, learning and ability displayed than in the celebrated *Girard* will case. And any impartial mind, after a careful study of the great argument of Mr. Binney in that case, sustained as it is throughout not only by an almost measureless wealth of research, but crowned with unanswerable logic, will not only be convinced of the fallacious reasoning through which the conclusion was reached in *Baptist Association v. Hart*, but will be forced to recognize the deep philosophy and truth by which the error in that case was overturned and repudiated by the opinion of Judge Story in *Vidal v. Girard*.

It is not, and cannot be now claimed, that the law of charitable trusts was not settled upon the true principles in the last-

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named case, principles irreconcilable with the erroneous doctrine laid down in *Gallego v. Attorney-General*, and subsequent decisions by this court. Upon what, then, rests the peculiar Virginia doctrine? It is traceable only to *Gallego v. Attorney-General*, and through that case to the erroneous decision in *Baptist Association v. Hart*. It has no other foundation, and has been persisted in here solely upon faith in what was said in that case, and long after the repudiation of the doctrine by the court in which it originated. It is true that, since the decision in *Vidal v. Girard*, the supreme court of the United States has, in cases arising in this state, according to its course, followed what was supposed to be the law here. The rule of that court, in this respect, is reasonable and just, and readily understood, especially when the state policy is well founded in fixed legal principles. But when the only foundation for such course by the supreme court of the United States is its own error, long since repudiated by that court, but persisted in here, it is difficult, if not impossible, to perceive upon what principle that court should, after righting itself, still follow and recognize as law the error imparted to us by that tribunal.

We have seen that Judge Carr in *Gallego v. Attorney-General*, was far from being certain that the statute of Elizabeth was ever in force in Virginia; nor did he assume as a fact that it was, and was repealed in 1792. But Judge Tucker also delivered an opinion in the case, and a very elaborate one, which is usually referred to as the leading opinion in the case. He goes much further than Judge Carr had gone, and discusses the question upon two grounds: 1st, as to the effect of the repeal of the statute of 43 Elizabeth, assuming that it was in force here and was repealed in 1792; and, 2d, upon the ground of public policy.

On the first ground Judge Tucker says: "Whether that statute ever was in force here, has been made a question in the cause. I incline to think" (mark his words), "it may have been, at least according to the construction which was given to

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it" (evidently referring to the construction given in *Baptist Association v. Hart*), "and which considered it not as merely constituting a commission for enquiring into breaches of charitable trusts, but as greatly enlarging, if not as opening an entirely new field for the exercise of benevolence. Though local in its operations in some respects, it was general in its operation in others. If it was ever in force, however, it was repealed in the year 1792, in the general repeal of English statutes." So far, Judge Tucker agrees with what was said by Judge Carr, except that Judge Tucker says, that while the statute of Elizabeth was local in its operations in some respects, it was *general in its operation* in others, but fails to point out in what respects the statute *was general in its operations*. In our opinion the statute was purely local. We do not believe it capable of being otherwise construed. It was not adapted to the condition of a young colony. And a significant circumstance to show that it was never in force here is, that in no one of the cases, from *Baptist Association v. Hart*, down to *Stonestreet v. Doyle*, is there an intimation that the remedial machinery provided by that statute was ever provided for Virginia, or that a single commission was ever sued out of chancery as provided by that statute. In so long a period there would have been some case, if the statute had been general and in force here.

Judge Tucker proceeds to say: "That repeal was no rash or unadvised act. By an act of the session of 1789, ch. 9, followed by the act of 1790, ch. 20, a commission * * * * was appointed whose duty it was, among other things, 'to prepare bills upon the subject of such English statutes, if any there were, which were suited to this commonwealth, and had not been enacted in the form of Virginia laws.' The committee of revisors proceeded to the discharge of the duty confided to it, and the result was the act of 1792, by which all English statutes then in force were declared to be repealed, the legislature reciting, that at that session it had specially enacted such of them as appeared worthy of adoption." Obviously, all this proves nothing, ex-

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cept that what was merely an inclination to the opinion that the statute may have been in force here, has, in a brief sentence or two, grown into the conviction that it was—and was repealed—and that this repeal was no rash or unadvised act.

By this mode of reasoning, that able judge, to whose opinions, as a rule, we all yield the most cheerful respect, arrived at the conclusion, not warranted by his premises, that the statute was in force here and was repealed, and that the repeal thereof “must be looked upon as an advised act of legislation, and in the same light as if it had been specially repealed by its title.” And he goes further and assumes, that “if there were any recognized charities of an indefinite character at common law, the broad language of the statute of Elizabeth comprehended them,” and that in so far as it did comprehend them, it reduced only to the form of a statute what was law before the statute, and that our legislature, in repealing it, *must* be regarded as having repealed not its mere naked words, but the common law principle involved.

Keeping in mind, as stated by Judge Tucker, that it was a question in the case whether the statute was ever in force here, and that Judge Tucker, himself, *merely inclined* to the opinion that it *may have been*, the enquiry is forced upon us, by what authority the conclusion was arrived at, not only that the statute was in force here, and was repealed in 1792, but that the common law principle involved was also repealed?

The very material question, looked at from Judge Tucker's standpoint, can best be determined, not by the commission referred to by him, but by looking back and enquiring into the circumstances which brought about the legislation relied on as having repealed the statute in question.

In the transition from colonial dependence to the position of an independent State, it became necessary for the proper administration of justice to continue in force, for the time being, the common law and English statutes of a general nature so far as not repugnant to our new institutions. Hence, the gen-

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eral convention, in 1776, passed an ordinance declaring that the common law and English statutes of a general character, not so repugnant, and not merely local to the kingdom of Great Britain, should continue in force until altered by the general assembly. See ordinance, 1 Rev. Code, ch. 38, p. 135. Then, when this state of things had lasted for a number of years, came the commission of revisors referred to by Judge Tucker, and then the act of 1792. See 1 Rev. Code, ch. 40, p. 136. The act of 1792, after reciting in full said provision in the ordinance of 1776, in the third section declares "that so much of the above recited ordinance as relates to any statute or act of parliament, shall be and is hereby repealed; and that no such statute or act of parliament shall have any force or authority within this commonwealth." Such is the entire repealing clause in the act of 1792. It is simply responsive to the ordinance of 1776. It, in the most general way, declares that English statutes of a *general nature*, such as had not been adopted, should thereafter be without authority in this commonwealth. No reference to the statute of Elizabeth is made; nor is there, either in the ordinance of 1776 or in the act of 1792, even the remotest intimation that it was intended to be embraced, or was general in its nature and could be.

But there is another view, which shows that Judge Tucker was mistaken in the conclusion at which he arrived,—and this, whether the statute of Elizabeth was ever in force here or not. The act of 1792 contains a saving clause, in every respect as broad and comprehensive as the repealing clause in that act. It is the 5th section thereof, which reads: "Saving, moreover, to this commonwealth, and to all and every person and persons, bodies politic and corporate, and each and every of them, the right and benefit of all and every writ and writs, remedial and judicial, which might have been legally obtained from or sued out of any court or jurisdiction of this commonwealth, or the office of the clerk of such court or jurisdiction, before the commencement of this act, in like manner, with the like proceed-

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ings thereupon to be had, as fully and amply, to all intents, constructions and purposes, as if this act had never been made; anything herein contained to the contrary, or seeming to the contrary, notwithstanding."

Now, the proceedings authorized by the statute of Elizabeth had to be commenced by a commission to be sued out of chancery. The statute itself was simply remedial and ancillary to the ordinary jurisdiction theretofore residing in chancery. See *Vidal v. Girard*. The commission authorized by the statute, and to be sued out of chancery, was necessarily, therefore, in the nature of a remedial writ. The high court of chancery was established in Virginia in 1777, fifteen years prior to the repealing act of 1792; and if the statute of Elizabeth was ever in force here, it was in force during all that period, and the initiatory process of commission was, for all that time, *legally* suable out from the high court of chancery, and, therefore, necessarily embraced in said saving clause, and the substantial benefits of the statute, if any, were thus preserved to the people of Virginia, though the statute in this view, may have been in other respects repealed. Therefore, in any view of the subject, it is manifest that the conclusion of Judge Tucker in regard to the statute of Elizabeth is necessarily a mistaken one.

But it is wholly immaterial whether the statute of Elizabeth was ever in force here or not. That statute created no new law; it only created a new and ancillary jurisdiction by commission to issue out of chancery, to enquire whether funds devoted to charitable purposes had been misapplied. Upon this subject, Mr. Perry, referring to the importance of the decision in *Vidal v. Girard*, justly remarks, that "the consequences of this final determination is important in this respect, that courts of equity, in the various states where they are not prohibited by statute, exercise an original jurisdiction in equity over charities, and apply to them the rules of equity, together with such other rules, applicable to charitable uses, as courts of equity may exercise, under the constitution and laws of the several

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states; and the courts do this by virtue of their inherent powers, without reference to the question whether the statute has been technically adopted in their states." Perry on Trusts.

This presents the case in Virginia precisely. There is not, nor was there ever in this State, any statute *forbidding* courts of equity to exercise jurisdiction over charitable trusts; it belonging inherently to courts of equity to exercise jurisdiction in all matters of trust and confidence.

In the next place, was there in Virginia, in 1832, when *Gallego v. Attorney-General* was decided, a pronounced public policy hostile to charitable trusts? Such is the real question. We have nothing to do with the disposition of the church to acquire large wealth and to encroach upon the civil affairs of government, nor with the rapacity of the clergy in the early periods of the church, so eloquently portrayed by Judge Tucker, and, as we feel constrained to say, outside of and beyond the case he was considering.

In his opinion, (3 Leigh, 478) Judge Tucker says: "No man at all acquainted with the course of legislation in Virginia can doubt for a moment the decided *hostility* of the legislative power to religious *incorporations*." No one will deny the truth of Judge Tucker's remark, as applied especially to the early days of the commonwealth, and to acts such as that of 1784, incorporating the Episcopal church, or to acts creating religious establishments in the sense of that term as used in the bill of rights: that is establishing a religion by law, and supported by the state. But no such question was involved in the case Judge Tucker had under consideration, nor was there any question touching the policy of the state in respect to corporations of any character, whether religious or not. The question was in respect to a devise and bequest by Mr. Gallego to the Catholic congregation in the city of Richmond.

Judge Tucker further said: "Jealousy of the possible interference of religious establishments in matters of government, if they were permitted to accumulate large possessions, as the

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church has been prone to do elsewhere, is doubtless at the bottom of this feeling" of hostility. "Hence," he says, "the provision in the bill of rights; hence the solemn protest of the act on the subject of religious freedom; hence the repeal of the act incorporating the Episcopal church, and of that other act which invested the trustees appointed by religious societies with power to manage their property; hence too, in part, the law for the sale of the glebe lands; hence the tenacity with which applications for permission to take property in a corporate character (even for the necessary grounds for churches and grave-yards) have been refused."

It will be observed at a glance that Judge Tucker's language and every act of legislation referred to in support of his position, is aimed at religious corporations—religious establishments, and is not applicable to the question of charities, the only question involved in the case he was considering, or in the branch of the case he was considering; nor is there, in any of the legislation referred to by him, even an intimation of *hostility* to charity or to charitable uses.

As to the act repealing the act incorporating the Episcopal church, and the act authorizing the sale of the glebe lands, they were but acts deemed essential to the completion of the work of the revolution. Like the other acts referred to, there is not in either of them an intimation even of *hostility* to charitable bequests for religious or other uses. Any such sentiment was directly opposed to the personal freedom and freedom of conscience which those very acts were intended to assert, uphold and perpetuate.

One of the grand results of the revolution was the divorce of church and state. Our people were justly jealous of a religion established by law. They, or those of them who were dissenters, had for over one hundred years paid unwilling tribute to a church establishment. They regarded the act incorporating the Episcopal church, and other acts of a kindred nature, as having a dangerous tendency towards the re-establishment of that

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church in Virginia. For that reason, and only for that reason, they were denounced as "sinful and tyrannical," and were repealed.

As to the "solemn protest" in the act for the establishment of religious freedom, it was not against charity or the right of courts of equity to administer charitable trusts, but was against the "impious presumption of legislators and rulers, *civil* as well as ecclesiastical, who, though but fallible men, assumed dominion over the faith of others, and compelled them to contribute money for the propagation of opinions they did not believe."

It is well to remember, too, that the act for religious freedom holds this language: "That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill-tendency, is a dangerous fallacy, which at once destroys all religious liberty, * * * * *; that it is time enough for the rightful purposes of civil government, for its officers to interfere, when principles break out into overt acts against peace and good order."

For these reasons, after a careful survey of the subject, we feel constrained to hold that the doctrine laid down by Judge Tucker, in *Gallego v. Attorney-General*, cannot be upheld upon either principle or authority. In fact, we feel assured that our present pronounced liberal policy was largely induced by certain expressions in that case. So much as to *Gallego v. Attorney-General*.

But whatever may have been the real, or the supposed legislative policy of this State when *Gallego v. Attorney-General* was decided, the legislature has since, in clear and unmistakable terms, marked out, as applicable to cases like the one now under consideration, a policy distinctly opposed to the doctrine laid down in that case, as commonly understood and contended for. The policy thus set on foot, and now the controlling law of the subject, is clearly indicated in sections 2 to 10 of chap.

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77 of the Code of 1873. The said second section is broad and comprehensive in its terms. It makes valid every transfer of property, real and personal (other than for the use of a theological seminary), which has been made since the 2d day of April, 1839, or which shall hereafter be made, by gift, grant, devise or bequest, for literary purposes, or for the education of persons within this State; and it is declared that the conveyance, whether made "to a body corporate or *unincorporated*, or to a natural person, shall be as valid as if made *to or for the benefit of a certain natural person*."

Thus a very wide field was opened for the safe and unrestrained exercise of benevolence and charity. If the legislature had in terms specified gifts, grants, devises and bequests for *charitable uses*, its obvious purpose to encourage and uphold charitable donations, for literary and educational purposes, would scarcely have been made plainer. And thus it is, that the law in its comprehensive benignity, without regard to color, without regard to sex, age, rank or condition in life, makes this humane provision in aid of education—education without qualification or restriction. The legislative design doubtless was, and the effect is, to remove, to the extent named, the perplexing doubts and difficulties, in respect to charities, which had grown out of the decision in *Gallego v. Attorney-General*, and to leave with courts of equity, in the exercise of their ordinary powers, the duty of enforcing such donations where it can possibly be done consistently with established rules, or of rejecting them, as invalid, if plainly in contravention of any statute or rule of public policy, or so vague and indefinite that, for that reason, they cannot *possibly* be enforced.

So much for said second section. The legislative design, as above indicated, is made yet plainer, if possible, by succeeding sections in the same chapter. In the third section, speaking in reference to the provisions of the second section, it is declared that the gift, grant, devise or bequest, in either case, shall be taken and held for the uses prescribed by the donor,

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grantor or testator. Here we have the unqualified statutory recognition of the doctrine laid down in *Vidal v. Girard*, and other authorities referred to, that corporations may take and hold as trustees, and for the uses provided by the donor or testator, especially if the gift and the use prescribed be not repugnant to the purpose for which the corporation was created and exists.

The fourth section provides that the attorney for the commonwealth, in the circuit court of any county or corporation, in which any will, by which such bequests are made, could be offered for probate, shall, in the name of the commonwealth, institute all necessary proceedings to have such will admitted to record. In this we have the evidence of the friendly solicitude of the legislature in providing the necessary appliances for upholding and carrying into effect every charity so described as to be capable of enforcement.

By the 5th section it is provided, that when any such gift, grant or will is recorded, and no trustee has been appointed, or the trustee dies or refuses to act, the circuit court of the county or corporation in which the trust subject or any part thereof may be, may, on motion of the attorney for the commonwealth (whose duty it shall be to make such motion), appoint one or more trustees to carry the same into execution. And it is provided that the trustees, whether appointed by such instrument or by the court, may sue and be sued in the same manner as if they were trustees for the benefit of a certain natural person. And for enforcing the execution of such trust it is provided, that a suit may be maintained in the name of the commonwealth, when there is no other party capable of prosecuting such suit. By this section we have, first, the legislative recognition of the familiar doctrine that courts of equity will not permit a trust to fail for want of a trustee; and second, the fact that the legislature had necessarily and prominently in view the subjects of charitable trusts, and foreseeing that, as indefiniteness as to the recipients is an essential element of a legal

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charity, there would not be, in many cases, any one capable of suing until the recipients were selected, made it the duty of the commonwealth's attorney to institute necessary proceedings, in the name of the commonwealth, for enforcing the execution of the trust. Thus we have in the statute itself a complete answer to the objection, made in argument, that there is, in this case, no one who can come into equity for the enforcement of the trusts. The legislature wisely foresaw the trouble that might arise, and with jealous care provided against it; and by the 6th section provided that the attorney for the commonwealth should be paid for his services out of the trust subject.

Passing over the 7th, 8th and 9th sections, which have no direct bearing on the subject, we come to the 10th section, which reads: "In case any devise or bequest, authorized by the 2nd section of this chapter, shall hereafter be made, the legislature, as to any such, reserves the right at any time to suspend or repeal the authority thereby given. But if in any case it shall do so, it will provide that the subject of such devise or bequest shall vest or be vested in such person, his heirs, executors or administrators, as would have been entitled had the devise or bequest not have been made." Thus, fully rounded, we have the legislative policy of this state upon the subject of charitable bequests for literary and educational purposes. It is important to keep prominently in view the fact that the prime object of the legislature was to give authoritative expression to the validity of charitable trusts. Hence, in *Roy's ex'ors v. Rowzie*, 25 Gratt. 599, Moncure, P., commenting on the acts of 1839 and 1841, as now embodied in the Code of 1873, says, "the only purpose was, and only effect is, to make valid a certain class of indefinite charities." Further on in the same case, the same judge says, "the purpose of the acts of 1839 and 1841 was to make valid a certain class of donations which had never been valid before." For reasons already stated we do not assent to the view that the legislation referred to was actually necessary to make valid donations to charity which were not valid before.

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But, being of opinion that such donations were valid at common law, and that the common-law principle involved has not been repealed in Virginia, we regard the acts in question, so far as they go, as simply declaratory of the common-law principle which had been denied in *Gallego v. Attorney-General*, but subject to the limitations and restrictions imposed by statute. But the view expressed by Judge Moncure is, nevertheless, the authoritative declaration of this court that the object of the legislature was to encourage and uphold donations for charitable purposes. In doing this the legislature has effectually repudiated and overturned the doctrine laid down in *Gallego v. Attorney-General*, especially in the opinion of Judge Tucker. The conclusion reached in that case by Judge Carr was, that in Virginia charitable trusts stand on the same footing with ordinary trusts, and must alike be enforced or rejected; that is, if definite they will be enforced; otherwise, not. It cannot be supposed that Judge Carr was unmindful of the fact that a charitable trust is, as to the recipients, necessarily indefinite. So when he speaks of *indefinite charities* as being incapable of execution by courts of equity, he ought to be understood as speaking with reference to charities indefinite upon the principles of the common law, so vague and uncertain that the courts cannot discover the real intention of the donor, and, therefore, cannot execute them. We think Judge Carr's language fairly open to such a construction, and in this view there can be no reasonable objection to the substantial effect of his conclusion; for obviously a charitable trust, though necessarily indefinite as to the recipients until they are duly selected, is not for that reason invalid, and, if in other respects certain, is valid, and will be upheld and enforced upon precisely the same principles applicable to the most ordinary trusts.

In view of the plain statutory provisions before referred to, how can it be reasonably contended that the bequests to the appellant corporation are not valid? We have seen that they cannot be treated as void, because, as assumed in the decree, they

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are not to the corporation absolutely, but upon the trust and for the use prescribed by the testator. We have also seen that they are not invalid because religious in their character. And upon this point it may be added, that with the acts of 1839 and 1841, in full force, the legislature, on the 28th day of February, 1854 (see Acts 1853-4, p. 65), passed an act incorporating "The Protestant Episcopal Theological Seminary and High School, at Alexandria, Va." Afterwards, on the 23rd day of January, 1872, this act was amended. (See Acts 1871-2, p. 23.) On the 8th day of January, 1875 (Acts 1874-5, p. 16), the legislature chartered the appellant corporation by the name of "The Trustees of the Protestant Episcopal Education Society in Virginia." The corporate name of this society, as well as the titles of all these acts, all powerfully attest the fact that the object of each was to provide for *education*, and for *theological* education, in the interest and according to the uses of the Protestant Episcopal Church in Virginia. Can it be doubted that the legislature knew what it was doing? Can it be supposed for a moment, that in deliberately chartering a society of this character, the legislature was ignorant of the fact that the object of the grant was the education of young men for the ministry in that church? Or that the legislature or the courts would or could treat such education, the very object of the society, as in violation of its chartered right? Surely not.

Under the same general law, we have in Prince Edward county, an incorporated theological seminary. Does any one suppose that in that case the charter was asked for or was granted with any other view than the education and training of men as ministers, according to the peculiar theological system of the Presbyterian church? And whether taught theology at the one school or the other, how can it be said, in either case, that the public policy has been violated?

What is the public policy as to any given subject can only be determined by the current legislation on that subject. Hence, in *Roy's ex'ors v. Rowzie & als.*, 25 Gratt. 611, Moneure, P., de-

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livering the opinion of the court, said: "Nor is there anything in the policy of our law, as has been argued, which can make such a bequest unlawful. The policy of our law on the subject extends no further than the law itself has extended. The law has extended only to this, that in giving effect to indefinite charities for literary purposes it has made an exception of a theological seminary, and that is the only extent of the policy of the law." And Judge Moneure adds: "The law has left unaffected the right to make a bequest for a certain and definite object, though it be a theological seminary."

In this case we have no concern with the statutory exception as to a theological seminary, as the bequests here are not to make a seminary. Now, it has been settled by this court, in *Roy's ex'ors v. Rowzie & als.*, 25 Gratt. 599, that a devise or bequest to an incorporated theological seminary, whether located within or out of this state, is not void as against either public policy or any statute, and this notwithstanding the broad language of the exception contained in the statute. Now, suppose the bequests in this case had been to the theological seminary at Alexandria, whose business it is to educate ministers according to the Protestant Episcopal creed, would any one doubt its validity? We think not. But suppose the bequests had been made to that institution "to be used exclusively for educating poor young men for the Episcopal ministry, upon the basis of evangelical principles, as now established," and the authorities of the seminary had been asked, "can you take and hold for the use prescribed?" The unhesitating answer would have been, yes; for that is exactly what it is our chartered right to do, what we have been doing, and will to the end continue to do, to the exclusion of all other work. The law makes the same answer in this case. The appellant corporation is chartered for the express purpose of educating young men for that ministry; it has been and is still engaged in that work, and rightfully so. So far from this being in contravention of public policy, it has the express sanction of law.

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In any view, and according to the plain letter of the law, the bequests in this case are in every respect as definitely and clearly stated as it is possible to describe a charity for such a use. This being so, it necessarily follows that the second proposition announced in the decree, that these bequests are null and void because too vague and indefinite to be upheld under the law of this State, or to be administered by a court of equity, is palpably erroneous and must be rejected.

In arriving at our conclusion, we have not been unmindful of the great public importance of the question we have been dealing with. At the same time we have kept in view the fact that it is the natural right of every man, recognized in every country where an enlightened system of jurisprudence prevails, a right guaranteed by our constitution and laws, to acquire, use and enjoy property, with the right to dispose thereof according to his own will and pleasure, and this without any limitation except that a man shall not use his own to the detriment of others. Keeping in view at the same time our duty to give effect to the will of the testator if possible, and seeing clearly that under the law we can do so, we have the consoling reflection, that in performing that duty, effect is given to a noble act of christian benevolence and charity.

Being of opinion that the bequests in this case are valid, and that the decree of the circuit court in respect thereto is erroneous, the same must be reversed, with costs to the appellant, and the cause remanded to the circuit court of Augusta county for further proceedings to be had therein, in conformity with this opinion.

LEWIS, P., and HINTON, J., dissented.

DECREE REVERSED.

Staunton.HOBSON & ALS *v.* WHITLOW & ALS.

SEPTEMBER 24TH, 1885.

1. TRUSTS—*Possessors of trust property—Liability.*—Trusts are enforced not only against regularly appointed trustees, but also against all persons who come into possession of trust property with notice of the trust.
2. IDEM—*Purchasers with notice—Liability.*—Purchasers or grantees of trust property with notice of the trust, though they have paid the entire consideration, themselves become trustees, and liable to the *cestuis que trust* for the fulfillment of the trust.
3. IDEM—*Grants on condition—Liability of grantees—Sub-grantees with notice.*—Where land is conveyed to A. in consideration that he pay a certain debt, and A. does not execute the deed, but accepts it, and takes possession and holds the land, A. is personally liable for the debt, and the land in his hands is also liable. *Vanmeter v. Vanmeters*, 3 Gratt. 142. And if A. convey the land to B., who has notice of the consideration, B. too, is personally liable for the debt, and the land in his hands is also liable.

Argued at Richmond and decided at Staunton.

Appeal from decree of circuit court of Campbell county, rendered 28th October, 1882, in the suit of John H. Whitlow and Samuel S. Whitlow, legatees and devisees of their father, W. W. Whitlow, deceased, *against* E. M. Hobson and Susan, his wife, and James W. Hobson and Bettie L., his wife, for \$1049.32, balance due on the bonds executed by C. C. Betterton for the purchase money of a tract of land sold under a de-

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cree of said circuit court in the cause of Maddox, administrator, v. Whitlow's executor. which was afterwards conveyed to J. W. Herndon in consideration that he would pay the said purchase money, and which was subsequently conveyed to the said E. M. and J. W. Hobson, who had notice of the said stipulation. The court below having decreed against said defendants, they obtained an appeal from the decree.

Opinion states the facts.

Kirkpatrick & Blackford, for the appellants.

E. D. Gallins and Kean & Kean, for the appellees.

FAUNTLEROY, J., delivered the opinion of the court.

On the 7th July, 1871, E. M. Stratton and E. A. Murrell, commissioners in the suit of Maddox, administrator, v. Whitlow's executor, sold a tract of land, formerly belonging to W. W. Whitlow, to Mrs. C. C. Betterton, for the sum of \$3276. She made the cash payment of \$100, and executed her three bonds for \$1058.66 each, with W. J. Betterton and J. W. Hobson, as sureties.

Mrs. Betterton died before any of the said purchase money bonds were paid, and leaving a totally insolvent estate.

On the 3rd day of July, 1880, this suit was instituted by John H. Whitlow and Samuel S. Whitlow, legatees and devisees of their father, W. W. Whitlow, deceased, against E. M. Hobson and Susan, his wife, and James W. Hobson and Bettie L., his wife, for \$1049.32, balance due on the aforesaid purchase money bonds, as of March 24th, 1880, the said defendants being liable for said balance by reason of the following facts: W. J. Betterton was owner of four-fifths interest in his father's estate, and of seventeen-twentieths of a mill-property located in Campbell county, which, by consent of all parties in interest, was sold

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under decree of the circuit court of Campbell county, in 1872, in the suit of Betterton v. Hobson, for distribution among the heirs of his father. J. W. Hobson became the purchaser, making a cash payment of \$200, and executed his bonds, in one, two, three and four years, for the residue of the purchase money, with E. M. Hobson as his surety; which said bonds were never paid, the said estate being purchased by a member of the family, was, apparently, treated by the family as if there had been no sale for division. J. W. Hobson and E. M. Hobson are brothers; they each married sisters, and sisters of W. J. Betterton; so that the kinship of the family is very close, their interests nearly allied, and the shifting of property among themselves very frequent, as shown by the record.

In 1876, W. J. Betterton conveyed by deed all his aforesaid interest in his father's estate and mill-property, along with all his unsold interest in the Whitlow lands purchased by his mother, to one J. W. Herndon, in consideration that the said J. W. Herndon, amongst other things, would "pay the balance of the purchase money due upon the Whitlow tract of land, and for which said Betterton is liable, as surety;" the said Herndon assuming in said deed the said indebtedness of said Betterton, and one of the considerations moving from said Herndon in said deed being the assumption by him of the debt due by Betterton on the Whitlow tract of land.

In 1877, W. J. Betterton became a bankrupt, and in his schedules made no mention of or reference to the Whitlow debt, manifestly because the payment of the Whitlow debt had been transferred to and assumed by J. W. Herndon as aforesaid. In March, 1878, W. J. Betterton was duly discharged as a bankrupt; and on the 3d day of May, 1878, he, with J. W. Betterton, repurchased of J. W. Herndon all the said interest in the Betterton estate, but made no reference to the Whitlow lands; except that W. J. Betterton, in the contract of purchase, undertook to release Herndon from his said covenant to pay the

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Whitlow debt, which had attached as an equitable lien to the said interest, by his conveyance to Herndon for the benefit of the Whitlows before his act and passage through bankruptcy.

On the 2d of August, 1879, W. J. Betterton, J. N. Betterton and E. R. Betterton sold and conveyed all said interest in the Betterton estate, along with E. R. Betterton's separate interest, to appellants, Bettie L. Hobson and E. M. Hobson, who had notice of, and were fully conversant with, the said stipulations and covenants contained in the deed from W. J. Betterton to J. W. Herndon, expressly charging the said interests conveyed to J. W. Herndon in equity, with the payment of the Whitlow debt.

Upon the hearing of the cause, the circuit court pronounced its decree of October 28th, 1882, which is the decree appealed from, declaring that "the legal effect of the deed of the 28th November, 1876, from W. J. Betterton to J. W. Herndon, *filed as exhibit F.*, whereby the consideration moving to the said Herndon in the subjects conveyed, as should be necessary for the purchase, was dedicated for the payment of the bonds which said W. J. Betterton was bound for in the suit of Maddox *vs.* Whitlow, was to create an equitable lien upon the subjects and in favor of the beneficiaries of the fund represented by these bonds; and, therefore, the said Herndon, to that extent, was a trustee of the said subjects for their benefit; and the same in his hands, and in the hands of the defendants, E. M. Hobson and B. L. Hobson, claiming under him, with express notice, is liable in equity to be subjected to the satisfaction of the said lien."

In this opinion of the circuit court we fully concur. Those interests passing to the Bettertons, and from them to the Hobsons, all having notice of the conditions and stipulations of the deed from Betterton to Herndon, and claiming their title and interest under that deed, which they admit, the property in their hands are chargeable with the equitable lien of the Whit-

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low debt, exactly and to the same extent that they were so chargeable in the hands of the first grantee, J. W. Herndon.

The appellants were acquainted with the transaction and stipulations of the deed between W. J. Betterton and J. W. Herndon, and claim under that deed: they are affected with all the equities appearing upon it.

Story's Equity Jurisprudence, section 533, says: "if we advert to the cases on the subject, we shall find that trusts are enforced not only against those persons who are rightfully possessed of the trust property as trustees, but also, all persons who come into possession of the property bound by the trust, with notice of the trust." "A purchaser, or grantee, who has notice of the trust, at the time of his purchase, becomes himself a trustee, notwithstanding the consideration he has paid. The vested interest of a *cestui que trust* cannot be impaired or destroyed by the voluntary act of the trustees." 4 John. Ch. R. 136; *Shepherd v. McIver*, 3 John. Ch. R.

The case at bar is ruled by the cases decided in this court, of *Vanmeter's ex'or v. Vanmeters*, 3 Gratt. 142, and *William & Mary College v. Powell*, 12 Gratt. 372.

We find no error in the decree complained of, and the same must be affirmed.

DECREE AFFIRMED.

Staunton.

MASSIE'S ADM'R v. HEISKELL'S TRUSTEE & ALS.

SEPTEMBER 24TH, 1885.

1. **DEEDS—Construction—Case at bar.**—The construction of the deeds of conveyance from H. to P. and from P. to S. and P., passed into *res judicata* by the decision of this court in this cause when it was here in 1879. *Preston and Massie v. Heiskell's trustee*, 32 Gratt. 48.
2. **MISTAKE—Equitable relief.**—It is one of the original grounds of equity jurisdiction to amend an instrument made under a mutual mistake of fact, so as to do justice to all concerned, and place them as nearly as practicable in *statu quo*. And it matters not whether the mistake was as to the factors, the mode, or the result of the calculation.
3. **IDEM—Equity does nothing by halves.**—Where, under mutual mistake of fact, vendor grants more than vendee bargained or paid for, and a court of equity affords relief upon vendor's prayer, by allowing him compensation for the excess, his claim for such compensation is not a mere personal demand against vendee, but the title is deemed to be still in vendor as to such excess as security for the payment of said compensation, although the deed, as executed, reserved no lien for the purchase money.
4. **IDEM—Purchasers for value without notice—Set-offs—Encumbrances—Warranty.**—Vendee, to whom, under mutual mistake of fact, vendor has conveyed more than was bargained or paid for, cannot be regarded, as to such excess, as a purchaser for value without notice. But against vendor's claim for compensation for such excess, vendee may set off any counter-claim he may have for money expended by him in clearing the property of encumbrances existing thereon when the conveyance was made. Vendee's right to set off such counter-claims, is not founded on the idea of a breach of warranty, and is not affected by the question whether the warranty of the vendor was *general* or *special*, but rests on the principle that "*he that asks equity must do equity.*"

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5. STATUTE OF LIMITATIONS—*Mistake, &c.—Discovery.*—Cases of fraud, trust and mistake, are not within the statute of limitations. *Hunter v. Spottswood*, 1 Wash. 145. At all events, in equity, in cases of mistake, as in cases of fraud, the statute does not begin to run until the discovery of the mistake. *Rowe v. Bentley*, 29 Gratt. 760.
6. MISTAKE—*Presumption of payment.*—Claim for purchase money for excess of land conveyed under mutual mistake of fact, is unaffected by any lapse of time short of the period sufficient to raise the presumption of payment. And the existence of deeds conveying title and reserving no lien, cannot reduce the period of limitation to five years, because the averment and proof of the mistake, required the abrogation of the deed, at least *quoad* the purchase money for the excess over what was sold and paid for.
7. LACHES—*Abandonment of rights.*—It is well settled that *laches* cannot be predicated of those who are ignorant of their rights. Such defence is only permitted in equity to defeat an acknowledged right, on the ground of its offering evidence that the right has been abandoned. *Nelson v. Carrington*, 4 Munf. 332-43.

Argued at Wytheville, and decided at Staunton.

This is an appeal from a decree of the circuit court of Washington county, rendered on the 25th day of February, 1884, in the cause of D. Trigg, trustee of W. K. Heiskell, *against* W. A. Stuart, G. W. Palmer, T. L. Preston, Holston Salt and Plaster Company and N. H. Massie; and the cross-cause of N. H. Massie and T. L. Preston *against* Trigg, Stuart & Palmer, and said company.

This cause is a sequel to the cause of *Preston and Massie v. Holston Salt and Plaster Company*, 32 Gratt. 48, where its history is fully detailed. Only such outline will be here set forth as is essential to comprehend the points decided.

By deed of November, 1858, Heiskell conveyed to Preston all his right, title and interests, legal and equitable, in and to King's Salt Works estate, including the Hunter, 1-24, and the then Claiborne interests, stated to be 2-540 each, of the whole.

By deed of July, 1859, Preston conveyed all of his property, including his interests in King's Salt Works estate to Gibbony,

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in trust to secure his (Preston's) debts. Gibbony, trustee, paid the debts without selling those interests.

By deed of July, 1862, Preston, Heiskell and Gibbony, united in annulling the deed of November, 1858, and Heiskell re-conveyed his said interests in the King's Salt Works estate, except his said Hunter interest, to Preston, using same language as before.

By deed of 1869, Heiskell conveyed to D. Trigg, trustee, all his interests in said estate; and by deed of 1875, Trigg, as such trustee, conveyed the same interests to Stuart & Palmer, for \$18,500, in the stock of the Holston Salt and Plaster Company, which had been incorporated of the shareholders of said estate, on condition that said \$18,500 of said stock be increased or diminished, according as the said interests should prove to be greater or less than was supposed.

In April, 1878, Trigg, trustee, filed his bill in the cause, insisting that the said then Claiborne interests were 11-540, instead of 6-540, and that the excess, 5-540, did not pass by the deed of Heiskell to Preston. The court below held, upon the bill taken for confessed as to Preston, that the deed from Heiskell to Preston did *not* convey the said excess, and directed an account of rents and profits. At the succeeding term, Preston applied for leave to file his answer, wherein he said that if he was to make compensation for the excess, there were encumbrances, set out by him, on the interests sold by him to Heiskell, which the latter was to, but did not discharge, and which he discharged, and asked to be compensated therefor. N. H. Massie also tendered his petition, setting up Preston's claim, demanding to stand in his shoes as his assignee, by virtue of an assignment from Preston to him, therewith exhibited, and asking to be admitted as a party defendant, and to be allowed to file his answer. The court below refused to allow Preston's answer to be filed, except as a petition for a rehearing of the decree; denied Massie's petition, overruled the prayer to re-hear the decree, and decreed that Heiskell's trustee was entitled to the excess of 5-540.

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This court, in July, 1879 (32 Gratt. 48), reversed the decree; allowed Massie to be made a party, and the answers of himself and Preston to be filed; held that the two deeds from Heiskell to Preston were so connected that the court could look to the deed of 1858 in construing the deed of 1862; that the latter conveyed the interests derived by Heiskell from the three Claibornes; that this was sufficient description to pass the whole interest of Heiskell; and that, it being apparent that such was the intention of both parties, the addition, stating the amount of the interest derived from the three Claibornes, would not restrict the operation of the deed; but that, as both Heiskell and Preston were under a mistake as to the amount of the interests derived by Heiskell from the three Claibornes, and the contract and conveyance were made under that mistake, Heiskell's trustee was entitled to the excess over what Heiskell was supposed to possess, and sent the cause back; yet directed that Preston should file his cross-bill to put in issue the matters between him and Heiskell, and the other defendants.

After the cause had been remanded, in April, 1880, Trigg, trustee, filed an amended bill, reciting the allegations of his original bill, and the proceedings in this court, alleging the total insolvency of Preston, and praying that his lien on the 5-540 excess, be enforced, or that the deeds be re-formed, investing him with title to that excess, and for general relief. This amended bill was at October term, 1880, demurred to and answered by Stuart & Palmer and by said company. They said that they had made no contract with the plaintiff, or his grantor, in respect to the Claiborne interests; denied that he had any right to any part of the King's Salt Works estate; insisted that this court had adjudicated that the entire Claiborne interests had passed by the deed of Heiskell to Preston; and denied that any lien was retained, or that any purchase money was due him.

Preston also demurred to and answered the amended bill. He admits the sale from Heiskell to himself, and the mistake

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of both parties in supposing the Claiborne interests were only 6-540 of the King's Salt Works estate; but insists that Heiskell intended to sell, and that he intended to buy Heiskell's entire interest. He admits that the mistake should be corrected, but denies that Heiskell has been prejudiced, because when the mistake was corrected, it would be found that he had been largely overpaid for the entire interest. He also admits his legal accountability to Heiskell, for the mistake, but contends that it is only a personal demand against him, which is no lien of any kind on anything; and disputes the plaintiff's right to have Heiskell's deed to him so re-formed as to invest the plaintiff with title to the 5-540 excess. And he alleges that his claim against Stuart & Palmer for the balance due upon the corrected values of the Claiborne interests, had been assigned by him in March, 1875, to his co-defendant, N. H. Massie, for value received, which balance embraced also the amount due him on the \$3000, which in 1862 was left by him in Stuart & Palmer's hands to discharge encumbrances on the interests conveyed to them by him.

Massie also demurred to and answered the bill; and more fully details the matters set up in Preston's answer. He contends that the claim made by the plaintiff, if allowed, would greatly prejudice him, because he was a purchaser for value of Preston's claim against Stuart & Palmer, which arose out of Preston's conveyance to them in 1862, which purchase embraced not only the balance on the \$3,000 scaled obligation of October, 1862, but also the corrected values of the Claiborne and the James King interests; and that the prejudice would be the greater on account of Preston's insolvency. Massie says, that when Heiskell conveyed to Preston, and the latter conveyed to Stuart & Palmer, the parties were ignorant of the amount of those interests, and that the mistake was only discovered by Preston and himself in 1875; and claims that the amount due him as Preston's assignee is 6-284, with interest.

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In obedience to the decree of this court, Preston and Massie also filed their cross-bill, making all the other parties defendants. Therein they set out substantially the allegations in their answers. They state that the several interests conveyed by Heiskell to Preston, and by the latter to Stuart & Palmer, valuing the entire estate at \$350,000, were computed on the basis following, to wit:

“Trigg and Branch’s interest, 1-44th, . . .	\$ 2,430 55
James King’s interest, 91-5400ths, . . .	5,898 12
Claiborne interests, 1-90th,	3,888 80
	<hr/>
Total value, ,	12,217 55
Cash paid down,	9,217 55
	<hr/>
Leaving a supposed balance of	\$3,000 00”

They charge that by a scaled contemporaneous agreement, the \$3000 was left with Stuart & Palmer to indemnify them against any loss by reason of encumbrances on the interests conveyed. They also charge that they discovered the real amount and value of their interests about March 1st, 1875, and that the following is a true statement thereof, to wit:

“Trigg and Branch’s interests, 1-44th, . . .	\$ 2,430 55
James King’s interests, 77-4536ths, . . .	5,941 36
Claiborne interests, 11-540ths,	7,129 64
	<hr/>
Making true amount of sale,	15,561 55
Deduct cash payment,	9,217 55
	<hr/>
Leaving balance due Preston,	\$6,284 00”

Which entire balance was assigned by Preston, as before stated.

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They further allege that Massie informed Stuart in 1875 of the assignment, and demanded a settlement on the basis last stated; that Stuart examined it with him on several occasions, and declared that a settlement could be made without suit, and from time to time asked delay, until February 18th, 1878, when he wrote to Massie: "If you cannot give me more time, you must bring your suit. I cannot complain. Perhaps an adjudication by a court may be safest." This and other letters of like import, were filed as exhibits; and that afterwards, in April, 1878, Trigg, trustee, brought this suit.

The plaintiffs in the cross-bill aver that they made this explanation in advance to shield themselves from any imputation of *laches* in presenting their claims, should any such be made. They admit that Stuart & Palmer are entitled to credit for any sums actually paid by them to clear the interests conveyed from encumbrances. And they repeat that the balance is due to Massie alone, and not to the plaintiff. In conclusion, they pray that Stuart & Palmer answer, and say how much they *actually* paid out for the purpose, and that they be required to pay to Massie the sum of \$6284, with interest from October 1st, 1862, subject to credit only for the sums so actually paid out, and for general relief.

Stuart & Palmer and the company answered. They do not admit that a mistake was made in estimating and in computing the value of those interests, though Preston's deed to them did pass all that Heiskell's deed passed to Preston. They say that Preston had long been a joint-owner of King's Salt Works estate, knew all about it and his co-tenants, and everything connected with the title, or was at least in a situation to know; and that if there was any mistake, it was merely Preston's own error in the calculation, which, they say, "when there is no averment of fraud, a court of equity will not correct." They acknowledge the deposit of \$3000, to satisfy encumbrances, but say it was Confederate currency, and should be scaled at two

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and a half for one, according to the scale adopted by the court; that the whole transaction was in that currency; that the interests encumbered were the James King and the Claiborne interests; that the encumbrance on the former was \$1567.25, as of June 8th, 1869; that the encumbrance on the latter was the dower of Sarah Claiborne, widow of James King, Sr., who after his death, married Thomas Claiborne; and that an account would be necessary to ascertain the amount of their credits; but that their set-offs would exceed the amount deposited when so scaled. They also acknowledge the conversations and correspondence alleged in the cross-bill, but deny that they meant to admit the claim set up therein. In conclusion they plead the statute of limitations, and *laches*, as they had already done, in bar of the claim set up by the plaintiff, Trigg, trustee.

Trigg, trustee, also demurred to and answered said cross-bill, disclaiming in his answers all knowledge of the dealings of Stuart & Palmer with Preston, and of the latter with Massie. He denies that the assignment to Massie embraced the amount due on the corrected values of the interests conveyed. He avers that Massie took the assignment with full knowledge of the mistake, and that he stands only in the position of his assignor. He denies that Heiskell had been overpaid in any view, and the right of Massie to collect of Stuart & Palmer the corrected values, and to turn him, Trigg, trustee, over to Preston, who was insolvent. Depositions were taken proving Preston's insolvency.

In January, 1880, the death of Massie was suggested, and the cause was revived in the name of John B. Moon, his administrator. In May, 1882, exceptions to the answer of Stuart & Palmer were sustained, and they were given until August, 1882, to file their answer specifically stating the sums *actually* paid in removing the encumbrances. And the plaintiff in the original bill, insisting on a hearing thereof, and a decision of the principles of the cause, so far as that could be done before

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the hearing of the cross-bill, the cause was brought on and heard on the bill as amended, taken for confessed as to Heiskell's administrator, the demurrers, the plea of the statute of limitations, the answers, the general replications, exhibits, depositions, and arguments of counsel: and the court overruled the demurrers, adjudged the plea of the statute of limitations insufficient, because unsupported by any denial of the recent discovery of the mistake stated in the bill; and decreed that "under the circumstances, and upon the principles of equity," Trigg, trustee, was entitled to be substituted to the rights of Preston against Stuart & Palmer for compensation for the deficiency in the price of the Claiborne interests in King's Salt Works, the subject of controversy here. The circuit court further decreed that Massie took his assignment with knowledge of the rights of Heiskell's trustee and subject to those rights, on his belief that upon an equitable settlement, after charging Preston with the corrected values of the Claiborne interest, Heiskell would be indebted to Preston; and that the right of Heiskell's trustee is limited to Preston's right against Stuart & Palmer; but that to a final determination of the cause, an account and a hearing of the cross-bill would be necessary.

From this decree an appeal was allowed Massie's administrator; and in July, 1883, this court reversed the decree because the causes had been prematurely heard, saying that "until the cause is ready for hearing on the cross-bill the rights of the parties touching the question of compensation for the conveyance of the Claiborne interests could not be determined," and remanded the cause for further proceedings accordingly.

After the cause had been thus twice remanded, Stuart & Palmer filed their answer, January 26th, 1884, to the cross-bill, and the plaintiffs therein replied generally. In their answer they make a special statement of encumbrances on the interests conveyed to them, to wit:

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"On James King's interest,	\$ 1567 25
Interest to January 1st, 1870, (Mrs. C.'s death),	681 64
Rents and interest on rents covered by dowers of Mrs. C. and of Mrs. M., up to January 1, 1870, as per statement A,	4358 99
Rents and interest on the 5-540ths claimed as error in the sale of the C. interests,	3487 20
<hr/>	
Amount as of January 1, 1870,	\$10095 08
Cr. by \$3000 Confederate currency, scaled at $2\frac{1}{2}$ for one,	\$1200 00
By 5-540ths. at \$350,000, Confeder- ate currency for the whole King • Salt Works estate, scaled at $2\frac{1}{2}$ for one,	1296 30
Interest to date of Mrs. C.'s death,	1085 76
<hr/>	
Total credits as of June 1st, 1870,	\$3582 06
<hr/>	
Balance due Stuart & Palmer as of that date,	\$6513 02
Interest to July 26th, 1876,	2563 99
Amount of Mrs. W.'s dower from January 1st, 1870, to her death, July 22d, 1876,	1588 17
<hr/>	
Amount S. & P. as of July 22d, 1876,	\$10,665 18 "

They say that no part of the \$1567.25 and its interest, has been paid, but that it was the share to be borne by the James King interest, of a certain decree, which had been assigned by Preston's trustee, Gibbony, to them. The depositions of T. L. Preston and of W. A. Stuart, were taken as to the currency in which their transactions were had, and were conflicting. No account of the state of the monetary relations of Heiskell and Preston, or of the latter and Stuart & Palmer, growing out of

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these transactions, was taken. Yet, on the 25th day of February, 1884, the causes came on to be heard together on the papers formerly read, the cross-bill, the exhibits therewith, the answers of Stuart & Palmer, of the company and of Trigg, trustee, the general replications thereto, the former decrees and orders, the decrees of this court, and the arguments of counsel. The demurrers were overruled. The plea of the statute of limitations was not sustained, because "the recent discovery of the mistake set out in the bill, and in the cross-bill, and the circumstances stated in the latter to avoid the charge of *laches*, were not sufficiently answered." Heiskell's trustee was decreed to be entitled to the rights of Preston against Stuart & Palmer, for compensation for the deficiency in the price of the Claiborne interests in the King's Salt Works, but only to the extent of those rights, yet paramount to the claims of Massie. Preston was held to be entitled to set-off Heiskell's trustee's claim against him for compensation for said deficiency, with the amount paid by Preston to discharge encumbrances on the Claiborne, and on the Trigg and Branch interests which had been conveyed to him with *general* warranty, but not those on the James King interest which had been conveyed to him with *special* warranty by Heiskell; and an account of the same was ordered. Stuart & Palmer were held to be entitled to set-off Preston's claim against them for said deficiency, as to all of those interests, with the amount paid by them to discharge encumbrances thereon, because all of those interests had been conveyed to them by Preston with *general* warranty, and an account thereof was ordered.

From this decree also an appeal was allowed Massie's administrator, and upon that appeal the case is here now for decision.

James H. Gilmore, for the appellant.

White & Buchanan, for the appellees.

Opinion.

RICHARDSON, J., after stating the case, delivered the opinion of the court.

The complications of this case are more apparent than real, and are caused by the triangularity of the demands set up by the several parties, and by the numerous pleadings in which the same matters are iterated and reiterated. One of the most difficult questions in it, that is, the construction of the deeds of conveyance from Heiskell to Preston, and from Preston to Stuart & Palmer, on the first appeal passed into *res judicata*; as this court decided that those deeds conveyed the entire interests (except the Hunter interest,) of Heiskell in the King's Salt Works estate; that those interests embraced the entire shares of the three Claibornes in said estate; that they were 11-540ths of the whole estate; that when those deeds were made, the parties supposed the Claiborne interests to be only 6-540ths, instead of 11-540ths, and by mutual mistake had computed the value thereof accordingly; that Heiskell was entitled to compensation for the 5-540ths which had been conveyed, but were overlooked in the computation. And we are of the opinion that it is equally clear that the mistake extended and entered into the computation of the purchase money, the sale and the conveyance of Preston to Stuart & Palmer, and that Preston also is entitled to a correction of the mistake and to compensation for the 5-540ths which were overlooked in the computation of the purchase money payable to him by his vendees, Stuart & Palmer. The two deeds were executed within three months of each other. The language describing the interests conveyed, is substantially the same in both,—the Claiborne interests being in both described “as 2-540ths each.” Such mistake is averred in the bill, and also in the cross-bill. The averment is not positively denied by the respondents, Stuart & Palmer, but is only argumentatively contested. They contend, that if there was error in the deed to them, “it was a

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mere error of the grantor's own in the calculations," and that such error "is a very different thing from such a mistake as a court of equity will correct." We are of opinion that this contention is not tenable. It was a mistake of fact, a mutual mistake of grantor and of grantee, and whether it was a mistake as to the factors entering into the calculation, or a mistake as to the mode of the calculation, or in the process and result thereof, it matters not. In any event, it was a mutual mistake of fact, not of law, and such a mistake as it is one of the original grounds of equity jurisdiction so to amend as to do justice to all concerned, and to place them as nearly as practicable in *statu quo*. Adams' Equity [191]; Pomeroy's Eq. § 188; Story's Eq. Jur. § 155; *Hoback v. Kilgore*, 26 Gratt. 442; *Mauzy v. Sellers*, Id. 641; *Hunt v. Rousmaniere's adm'rs*, 8 Wheat. 174. In *Simpson v. Vaughan*, 2 Atk. 33, Lord Hardwicke said, a "mistake is a head of equity on which a court always relieves." See also *Snell v. Ins. Co.* 98 U. S. 89.

Then, just as Preston under Heiskell's deed, received more than he bargained and paid for, so Stuart & Palmer under Preston's deed, received more than they bargained and paid for. This court, on the first appeal, decided that Heiskell's trustee was entitled to compensation for that excess. And on the same principle, it is a facile and an inevitable conclusion that, the facts being identical, Preston, or his assignee, is also entitled to compensation for such excess. In the absence of proof to the contrary, the presumption is that such compensation should be in the same proportion that the 6-540ths bargained and paid for, bears to the 5-540ths not bargained and paid for, but conveyed under the mutual mistake. When that decision was made, it was undetermined whether or not, upon a fair settlement of accounts, Heiskell had been paid for the whole corrected values of the Claiborne interests, as Preston and Massie contended he had been. Nor has that important question of fact yet been determined. And it is yet undetermined also, how the balance stands between Preston and Stuart

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& Palmer. , But the parties all desire that the principles which underlie this case shall all be settled before they incur the labor and expense of an account, and we proceed to settle the questions which so far have arisen.

Preston and Massie, however, contend that no lien being retained in the deed of July, 1862, the claim of Heiskell's trustee for the additional compensation, is only a personal demand against Preston. This is a delusion. The relief is given on the ground of the clearly established mutual mistake in the deeds. To the extent necessary to complete relief (for equity does nothing by halves), the deeds must be re-formed, so as to vest the title to the said excess of 5-540ths in Heiskell's trustee, should it be ascertained, upon an account taken, that he has never been paid therefor.

This conclusion is, beyond all peradventure, correct, unless Stuart & Palmer are purchasers of that excess for value, without notice. Such purchasers they certainly are not, unless upon the taking of the proper accounts it shall appear that they have paid the price of said excess. They have, it is true, a conveyance of the 5-540ths. But the mutual mistake entered into the deed of Preston to them, as well as into that of Heiskell to Preston, and that circumstance entitled Preston, and all claiming under him, to a re-formation of these deeds, in order to do complete justice. Such re-formation having been so made, or considered as made, how can they claim to be such purchasers, when they not only have no conveyance for the excess, but are entitled to none, at least until they shall show that they have paid for the entire Claiborne interests? *Lamar v. Hale*, 79 Va., and authorities there cited.

Nor does Massie occupy higher ground than his assignor, Preston. He took an assignment of Preston's claim against Stuart & Palmer, for value, it is true, but with full notice of the mistake, and of Heiskell's equitable rights, and he must take the burden with the benefit, the maxim being *qui sentit commodum sentire debet et onus*.

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The same reasons apply as well to the James King interest in the King's Salt Works estate, as to the Claiborne interests therein. But it is contended, that whilst Heiskell did convey the Claiborne and the Trigg and Branch interests to Preston, with general warranty, and might be liable to Preston for all sums paid by him to disencumber them, he conveyed the James King interest to him with only *special* warranty, and hence would *not* be liable to compensate him for the sums paid by him to disencumber that interest.

After careful consideration we are of opinion that the distinction usually existing between general and special warranty has no application to this case. The relief afforded here is not on the ground of compensation for a breach of warranty, whether general or special. It is the re-formation of an instrument which, being executed under mutual mistake of the parties, as it stood, worked injustice. Heiskell's trustee asked no relief upon the deed and its provisions. He asked relief only on the ground of the mistake. He asks justice. He must do justice. That is a fundamental principle of equity. Heiskell conveyed 11-540 of King's Salt Works estate to Preston, when he supposed he was conveying only 6-540. He came into equity to have the mistake corrected, the deed re-formed, and for compensation for the excess. Preston has paid out money to remove incumbrances on the interests conveyed to him by Heiskell, and asks for reimbursement. To state the case is to demonstrate the obvious conclusion, that the maxim, "He that seeks equity must himself do equity," is justly applicable, and must govern the case in this respect. This principle is not confined to any particular kind of equitable rights and remedies, but pervades the entire field of equitable jurisdiction, so far as it is concerned with the administration of equitable remedies. Pom. Eq. Jur. § 388; *Jones v. Roberts*, 6 Call, 187; *Lipscomb's adm'r v. Miller's exors*, 1 H. & M. 204.

Stuart & Palmer, and also the Holston Salt and Plaster Company, plead the statute of limitations, not only against the

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claim set up by Preston, but also against that of Heiskell's trustee. It is manifest that the statute of limitations has no appropriate application to the case here made for relief on the ground of mistake, which has been established by such clear and strong proof as leaves no room for reasonable doubt. Were this a mere demand for unpaid purchase money for land conveyed without the retention of a lien, of course such plea would apply. But cases of fraud, trust and mistake are not within the statute of limitations. 1 Wash. 145; 4 Munf. 222.

At all events, in cases of mistake, as in cases of fraud, the statute does not begin to run until the discovery of the mistake. 1 Story's Eq. Jur. section 1521 a; *Rowe v. Bentley*, 29 Gratt. 760-1; 1 Danl. Chy. Pr. 645; 1 Barton's Chy. Pr. 98; Kerr on F. and M. 436.

The claim here which these respondents sought to meet by this plea, is a claim to resort to the land for the payment of the purchase money, and such a claim, under the circumstances, cannot be affected by any lapse of time short of a period sufficient to raise the presumption of payment. *Hanna v. Wilson*, 8 Gratt. 232; *Coles v. Withers*, 33 Gratt. 186. No such period has elapsed here; because, to say nothing of the discovery of the mistake as late as 1875, and if it be admitted for the sake of the argument, that the cause of action arose in October, 1862, the period of twenty years had not elapsed when this suit was brought in 1878; and when the war and stay-law period is eliminated, there will remain only a little more than nine years. *Coles v. Ballard*, 78 Va. 139.

The existence of the deeds conveying the title and retaining no lien, cannot avail to reduce the period of limitation to five years, because the allegation and proof of the mistake requires the abrogation of those conveyances, at least *quoad* the unpaid purchase money for the excess over the 6-540 mentioned therein. Those conveyances must be so connected as to do complete and effectual justice between the parties; the principle upon which the court acts in making corrections of mistakes, being that

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the parties shall be placed in the same situation as they would have been if the mistake had not been committed. Kerr on F. and M. 20.

The holders of the legal title will be considered in equity as trustees for the security of the payment of this purchase money.

It is also contended that Heiskell's trustee, and Heiskell himself before the trust-deed of 1869, and Preston have been guilty of *laches* in the prosecution of their respective suits, whereby they are debarred from relief in a court of equity. The answer to this has already been given in another view of the case. It is, that the original and the cross-bill both alleged that the mistake was discovered for the first time by the plaintiffs in 1875; and that the subsequent delay in bringing the suit for relief on account of the mistake, is satisfactorily explained. The allegation of recent discovery was not denied in the answers, and was only attempted to be met by arguments.

It is well settled that *laches* cannot be predicated of those who are ignorant of their rights. *Rowe v. Bentley*, 29 Gratt. 763. Such defence is, in equity, only permitted to defeat an acknowledged right on the ground of it affording evidence that the right has been abandoned. *Nelson v. Carrington*, 4 Munf. 332-343.

In conclusion, we are of opinion that there is no error in the decree complained of, except wherein it holds that the interest of James King in the King's Salt Works estate, having been sold to Preston with *special* warranty only, no allowances should be made to Preston for any sums of money expended by him in discharging incumbrances thereon. For this error the decree must be reversed, with costs to the appellant, and the cause remanded for further proceedings in the court below, in conformity with the principles of this opinion.

DECREE AFFIRMED in part, and REVERSED in part.

Staunton.

BOWMAN & ALS V. HICKS & ALS.

SEPTEMBER 25TH, 1885.

1. **REGISTRY—***Verbal sales of land.*—The statute in relation to the registry of contracts and deeds does not apply to verbal contracts for the sale and purchase of land.
2. **COMPLETE PURCHASER—***Judgment against vendor—Case at bar.*—B. held adverse, open and notorious possession of land from 1849 to 1862, when D. asserted claim to it, and B. buys up his claim under verbal contract, paying his price in full, and remains in such possession until 1881, when creditors of D., by judgments obtained since 1862, sue to subject the land to their judgments:

HELD :

Apart from B.'s title by such possession, he was a complete purchaser from D. before their judgments were obtained, and their liens never attached to the land.

Appeal, argued at Richmond and decided at Staunton, from decree of hustings court of Danville, in cause wherein S. D. Hicks, for himself and others, was plaintiff, and B. A. Davis and others were defendants. The object of the suit was to assert and satisfy certain judgments against said Davis, upon certain lands claimed and held by John Bowman and others under Peter Bowman.

Opinion states the facts.

John Merritt and S. G. Whittle, for the appellants.

E. E. Bouldin, for the appellees.

Opinion.

FAUNTLEROY, J., delivered the opinion of the court.

This is an appeal from a decree of the hustings court of the city of Danville, rendered July, 1882, in a suit in which S. D. Hicks, for himself and others, is plaintiff, and B. A. Davis and others are defendants.

The facts of the case, as disclosed by the record, are as follows: In 1848 or 1849, Peter Bowman entered upon the possession of a tract of land, containing one thousand acres, lying in Patrick county, Virginia, under a claim of purchase from M. D. Carter, deceased, agent for the heirs of Bullock. The said Peter Bowman and his son John resided on this land, and have held, occupied and enjoyed the same as their own, in an open and notorious manner, from 1848 or 1849, to the present time.

In the year 1862, one B. A. Davis set up claim to this land, when John Bowman, who was then on the land, and who, together with his father, Peter Bowman, had held and enjoyed exclusive and uninterrupted possession and use under claim of ownership, purchased the claim of said B. A. Davis, from B. A. Davis, for the sum of \$3000 in Confederate money, to quiet his and his father's title. The said contract of purchase was in parol; he paid the purchase money in 1862; and remained and continued upon the land and in possession of the same as his own, uninterruptedly, to the institution of this suit, in July, 1881, when the bill (which is an amended bill) was filed by the appellees, who were judgment creditors holding liens upon the real estate of the said Beverly A. Davis, seeking to subject the lands of the appellants, as vendees of the said Beverly A. Davis, to the satisfaction of their unsatisfied judgment liens.

In February, 1864, the said John Bowman applied to, and received from, the said B. A. Davis, a receipt or title-bond, merely to show that he had purchased and paid for the land. This obligation, receipt or title bond was never recorded.

The appellants, J. A. Branch, Marcella Branch and Ellen

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Branch, claim, as children and devisees of Olive Branch, a tract of 200 acres of land purchased by their said father, Olive Branch, by parol contract, in 1862, from the said B. A. Davis, which he, and they, claiming under him, have had possession, enjoyment and ownership of, exclusively and uninterruptedly, from 1862 till the filing of this amended bill, in July, 1881. The purchase money agreed to be paid for this tract was \$1000, of which the sum of \$643 was paid by the said Olive Branch to the said B. A. Davis, at the time of his said purchase by parol contract, in 1862.

Upon these facts, the court held that these aforesaid lands in the hands of the appellants, Bowman and Branch, are bound for the judgments against the said B. A. Davis, and decreed the sale and subjection of them to satisfy the judgment liens of the appellees. From this decree this appeal is taken.

We think the decision of the hustings court erroneous. The record shows no unpaid lien against B. A. Davis prior to 1862, when the appellant, Bowman, became the complete equitable owner of the land by his verbal purchase, and possession under it, and payment of the purchase money. He is a complete purchaser, entitled to the aid of a court of equity to call in the legal title in a suit for specific performance. *Preston's adm'r v. Nash*, 75 Va. 949; *Young v. Davis*, 31 Gratt. 309.

Judge Christian, in delivering the opinion of the court in *Young v. Davis*, *supra*, says: "These last-named purchasers were let into possession under parol agreements; and, having paid the purchase money, and being in a condition to call upon the vendor for specific execution before the judgment was rendered, upon the principles settled by this court in *Floyd, trustee, v. Harding*, and cases therein cited, the judgment cannot be enforced against these lands."

The pre-existing parol contract of 1862 being proved, it is immaterial to consider the paper of February 26th, 1864, given by B. A. Davis to John Bowman, at his request, whether it be a receipt, or memorandum, or obligation for covenants of title:

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it was no part of the previously complete contract between them. It was witnessed by one witness alone, and had it been recorded by the clerk, it would not have been "duly recorded;" and would have given constructive notice to no one. *Turner v. Stip*, 1 Wash. 319; *Johnston v. Slater*, 11 Gratt. 321; *Davis v. Beazley*, 75 Va. 491. In the language of Judge Staples, in *Floyd, trustee, v. Harding*, 28 Gratt. 401, to have required Bowman to record said paper would have been to require him to "perform an impossibility:" "and to provide that a man's property may be taken for another man's debt, without the fault of the owner, and without the possibility of guarding against it by the exercise of the greatest diligence." The evidence in the record developed a claim of title in Peter Bowman, and in John Bowman claiming under him, thus putting complainants on their guard, and rendering it necessary for them to show that Davis's title to the land was superior to that of the Bowmans. Davis had never been in *possession* of the land, and his title was put in issue by the pleadings: and not a scintilla of evidence is in the record to prove it. His claim to title—never asserted by him, either as a party to the suit, or as a witness in the cause—stands upon the naked, unsupported allegation in the amended bill (filed by his after-obtained judgment creditors) that John Bowman purchased the land of Davis, as the origin or source of his title; but, neither in his answer nor deposition does John Bowman admit this allegation or fact; his statement is, that in 1862, Davis set up a claim to the land, then, and uninterruptedly in his possession since 1848-9, as his own property; when he bought the claim set up by Davis, in order to quiet his pre-existing title. But if it were admitted or proved, that Davis, though never in *possession*, was *entitled* to the land, it was not, and is not liable to the after-acquired judgments of the appellees, who are creditors of Davis, his vendor.

The evidence in the record leaves no room to doubt, that in 1862, John Bowman, by a contract in parol, to quiet his title, purchased whatever interest Davis had or asserted in the land;

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continued in the possession from 1862, to the institution of this suit, in 1881, and had paid the whole of the purchase money. After this lapse of time, this bill having been filed in 1881, payment of the purchase money is a presumption of law. *Tinsley v. Anderson*, 3 Call, 329; *Booker v. Booker*, 29 Gratt. 605.

The hustings court erred in holding the lands in the hands of the appellants, Bowman and Branches, liable to the judgment liens of the appellees against Davis; and the said lands, under the decisions in *Withers v. Carter*, 4 Gratt. 407, and *Floyd, trustee, v. Harding*, 28 Gratt. 401, are free and exempt from such liability, except to the extent of the unpaid purchase money, admitted by the deposition and answer filed by the appellants, Branch, for the 200-acre tract purchased by Olive Branch. This balance, however, must be scaled, as the transaction was had in reference to Confederate treasury notes as a standard of value.

The decree complained of must be reversed and annulled.

DECREE REVERSED.

Staunton.

ASHBY v. BELL'S ADM'R.

OCTOBER 1ST, 1885.

1. APPELLATE COURT—*Commissioners' reports*.—It is well settled by repeated decisions of this court, that commissioners' reports, not excepted to, cannot be impeached before an appellate court in relation to matters which may be affected by extraneous testimony.
2. JOINT OBLIGATIONS—*Suit v. several—Defence by one*.—Where suit is on joint obligation, the bill is taken for confessed, and one of several defendants appears and disproves plaintiff's case, unless it be on some matter of defence which is purely personal to himself, plaintiff is not entitled to a decree against the others, but the bill must be dismissed.
3. ADMINISTRATORS—*Sureties—Devastavit—Statute of limitations—Case at bar*.—In 1865, E. sued out distress warrant against estate of J., deceased, which had been committed to sheriff, administrator, who wasted it. Warrant was placed in hands of sheriff's deputy to levy. It was never levied, but was returned to, and remained effete in clerk's office until 1880, when E.'s administrator brought chancery suit against sheriff-administrator and his two sureties, alleging the *devastavit*, and asking relief. Against principal and all his sureties, except A., the bill was taken for confessed. * A. answered and plead statute of limitations.

HELD:

1. The claim of E.'s administrator for the *devastavit* was debarred as against sheriff-administrator's sureties, *though not against himself*, when the suit was brought in 1880.
2. The suit being on the joint obligation of all the sureties, the defence by A., *not being purely personal to him*, enured to the benefit of all, and no decree can be entered against any.

Appeal from decree of circuit court of Clarke county, pro-

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nounced October 9th, 1884, in the chancery cause of E. Bell's administrator *against* Jonas P. Bell's administrator and others.

The bill was filed at the July rules, 1880, by the administrator of Emily Bell, deceased, who is the appellee here, against Washington Ferguson, late sheriff of Clarke county, and as such, committee administrator of Jonas P. Bell, deceased, and the sureties on his official bond. The claim asserted in the bill was, that at the death of the said Jonas P. Bell, which occurred during the late war, he was indebted to the plaintiff's intestate on account of rent for a certain farm, situate in the said county. That at the September term, 1865, of the county court of the said county, the estate of the said Jonas P. Bell, deceased, was committed for administration to the said Ferguson, sheriff, as aforesaid. And that soon thereafter, a warrant of distress was issued in favor of the said Emily Bell, directed to the said Ferguson as sheriff, commanding him to levy the same upon the goods and chattels of the estate of the said Jonas P. Bell, deceased, to satisfy the said claim for rent reserved upon contract. That said warrant of distress went into the hands of one James W. Ryan, a deputy of the said Ferguson, and was levied by him upon all the personal property belonging to the said estate, which was embraced in the appraisement list of the estate returned by the administrator to the clerk's office of the county court of the said county. That the property so levied on was not sold by virtue of the said warrant of distress, but was sold by the administrator; and that the proceeds of sale were never paid over, either to the said Emily Bell in her lifetime, or to the complainant after her death, but that the said indebtedness remains wholly unpaid. That the said Ferguson, as committee administrator as aforesaid, has never made any settlement of his accounts as such; but that he has wasted the estate, and converted the same to his own use. And the prayer of the bill was for all proper accounts to be taken; that the debt due the complainant be established as a preferred debt to be paid out of the estate of the said Jonas

Bell, deceased; and that a decree therefor be rendered against the said administrator and his sureties.

The cause was referred to a commissioner for an account, which was duly taken and returned to the court. In his report the commissioner said: "The claim of the complainant is for rent of property of Miss Emily Bell prior to, and during the late war. It has been proved before me that Jonas P. Bell occupied said property, and that its rental value was at least the amount claimed. A distress warrant was issued November 23, 1865, and placed in the hands of the sheriff, for the amount above stated. Said distress warrant with the sheriff's return thereon, and a copy of the order of the county court of Clarke county, entered at its term, 186 , filing the same, have been laid before me, and are, with the other evidence touching this claim, returned herewith. B. G. Ashby pleads the statute of limitations in bar of this claim, and I think it is

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barred. I have, however, stated the claim, that its amount may be known to the court."

The return on the distress warrant, to which reference in the commissioner's report is made, is as follows:

"The estate of J. P. Bell, deceased, committed to the sheriff by the county court. As deputy sheriff, I have taken an inventory and appraisement of his property, and advertised it for sale on the 25th November, when the within warrant of distress came into my hands. The plaintiff, Emily Bell, directed that the sale should proceed upon the terms as advertised as court administrator, which was accordingly done, and I have the bonds taken at the sale, and am ready upon the determination of the court and its direction to hand them over to whomsoever they may be adjudged to belong.

(Signed) JAMES W. RYAN. D. S."

To the report of the commissioner the plaintiff excepted, "because," in the words of the exception, "it sustains plea of statute of limitations to complainant's demand." No other exception to the report was taken. The cause coming on to be finally heard, the exception was sustained, "the court being of opinion that by the distress warrant issued at the instance of the complainant's intestate and filed in the papers of the cause, a lien was effected upon the property of the said Jonas Bell, now deceased, and that a recovery in this case is not barred by the statute of limitations." And, accordingly, it was further decreed that the complainant recover of the defendants the sum of \$504.21, with interest, etc.

From this decree Ashby appeals.

McDonald & Moore, for appellant.

M. McCormick, for appellee.

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LEWIS, P., after stating the case, delivered the opinion of the court.

It is clear that, inasmuch as there was no exception taken by the appellant in the lower court to the commissioner's report, the asserted claim must be held to be established as for *rent* due the estate of the plaintiff's intestate, and that the decree must be affirmed, unless on other grounds the contention of the appellant is well founded. For it is settled by repeated decisions of this court, that commissioners' "reports not excepted to, cannot be impeached before an appellate court in relation to matters which may be affected by extraneous testimony." *Peters v. Neville's trustee*, 26 Gratt. 549; *Cole's committee v. Cole's administrator*, 29 Id. 365; *Simmons v. Simmons' administrator*, 33 Id. 451.

It is insisted, however, that the claim is barred by the statute of limitations, and that the circuit court erred in sustaining the plaintiff's exception to the commissioner's report. On the other hand, it is contended that the running of the statute was suspended by the issuing of the distress warrant, on the 23d November, 1865. And it would seem from the language of the decree appealed from that, in the opinion of the circuit court, the warrant was actually levied, since it is held that "*a lien* was effected" on the goods and chattels of the estate of Jonas Bell, deceased; and that, therefore, the plaintiff's right to recover was not barred by the statute. The answer, however, which is responsive to the bill, denies that the warrant was levied; and it is evident from the terms of the report that such was the conclusion of the commissioner. At all events, he does not report that there was a levy, but says: "a distress warrant was issued * * * which with the sheriff's return thereon, * * * is returned herewith."

Looking, then, to the return, we find that it does not show that a levy was made, but that the personalty had been inven-

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toried and advertised for sale by the sheriff as administrator when the warrant was received; and further "that the plaintiff, Emily Bell, directed that the sale should proceed upon the terms as advertised * * which was accordingly done." And then the return concludes as follows: "I have the bonds taken at the sale, and am ready, upon the determination of the court * * to hand them over to whomsoever they may be adjudged to belong."

It is to be observed that no question has been raised, either here or in the lower court, as to the regularity or legality of this return. On the contrary, the same has been treated throughout as regular and as competent evidence of the facts stated therein. And this being so, we are constrained to conclude that the warrant was returned without having been levied. For why submit to the court the determination of the question as to whom the proceeds of the sale were payable, if there had been a levy and sale under the distress warrant? If such had been the case, the mandate of the warrant itself would have been a sufficient guide for the officer's action in the premises, without invoking the direction of the county court, especially as there were no conflicting claims of creditors to the fund. In short, it is manifest that the only reasonable inference from the return is, that the property was sold by the sheriff in his capacity as administrator, and that no levy under the warrant was made, in consequence of the instructions of the plaintiff herself. The warrant appears to have been returned to the clerk's office of the county court and there filed, and no action seems to have been taken in the matter until the institution of the present suit, nearly fifteen years thereafter.

But it is unnecessary to place the decision of the case on the ground that the warrant was in fact not levied. Suppose it had been levied. This is not a suit to enforce a lien upon specific property; and if it were, there is no property upon which the alleged lien could be enforced, for all the effects of the estate

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were sold by the administrator, in 1865, and presumably went into the hands of purchasers for valuable consideration, without notice of the claim of the plaintiff's intestate.

In *Franklin's adm'r v. Depriest*, 13 Gratt. 257, a suit in equity was instituted, alleging a *devastavit* on the part of the executor, and praying a decree for the plaintiff's claim. The case resulted in a protracted litigation, coming to this court, then going back for further proceedings to the circuit court, and finally a decree was entered in the plaintiff's favor. Thereupon an action at law on the executorial bond was begun, to recover the amount of the said decree; and it was held, in reply to the defence of the statute of limitations, that the statute did not begin to run in favor of the surety until the entry of the decree in the equity suit ascertaining the liability of the executor.

In *Leake's ex'or v. Leake et als*, 75 Va. 798, a creditor of the estate brought an action of *assumpsit* against the executor, in 1860, and recovered a judgment therein, in June, 1870. And within one year thereafter he filed his bill in equity against the executor and his sureties for satisfaction of the judgment. The defendants relied on the *ex parte* settlements of the executor, and insisted that the plaintiff's right to surcharge and falsify the same was barred after the lapse of five years. But this defence was overruled, this court saying that if there is any limitation in case of a *devastavit* at all, it is certainly not less than ten years.

A similar defence was relied on by the executor and his sureties, and with the same result, in the subsequent case of *Sharpe's ex'ors v. Rockwood et als*, 78 Va. 24, the court holding that the pendency of another suit by other parties against the executor, which enured to the benefit of the plaintiff in the suit then under consideration, effectually protected the claim of the plaintiff from the statutory bar attempted to be set up.

But very different from these cases is the present case. Here, although the claim is alleged in the bill to have accrued prior

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to the year 1865, yet no suit was instituted to recover it, until 1880. And to hold that the mere issuing of a distress warrant, fifteen years before the suit was instituted, which was returned unexecuted, and which has remained filed in the clerk's office, without vitality or effect, until the present time, operated to suspend the running of the statute of limitations, would be to announce a doctrine unsupported by principle or authority.

We are of opinion, therefore, that the right of action accrued when the warrant was returned by the sheriff, if not before, and that the case is within the statute, which enacts that upon the bond of a sheriff acting as a personal representative, suit shall be brought within ten years after the right of action shall have first accrued; which provision, however, applies only to the sureties on the bond, and not to the principal himself or his personal representative. Code 1873, ch. 146, secs. 8 and 9; 4 Minor's Insts. 508. Nor is the case of the appellant affected by anything contained in the last-mentioned section, which, among other things, provides that the right of action in favor of one obtaining execution against a personal representative, or to whom payment or delivery of estate in the hands of such representative shall be ordered by a court acting upon his account, "shall be deemed to have first accrued from the return-day of such execution, or from the time of the right to require payment or delivery upon such order, whichever shall happen first." For here there has been no execution against the appellant's principal, nor, prior to the institution of the present suit, any settlement of his accounts. The time at which the right of action accrued must, therefore, be determined independently of the statute. *Franklin's adm'r v. Depriest, supra.*

But the appellee insists that, conceding this to be true, the decree having been taken for confessed against all the defendants, and only one of them, namely, the appellant here, having afterwards answered, the decree must stand as against all, except the appellant. This position, however, is not well taken. The rule is, that where in a suit on a joint obligation, the bill

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is taken for confessed, and one of several defendants appears and disproves the plaintiff's case, unless it be on some matter of defence which is purely personal to himself, the plaintiff is not entitled to a decree against the others, but the bill will be dismissed as to all the defendants.

In *Cartigue v. Raymond*, 4 Leigh, 579, a bill was filed by a distributee against an administrator and his surety, alleging that the administrator had not duly accounted, and praying that an account be ordered, etc. The bill was taken for confessed as to the administrator, but the surety answered, and showed that on a final settlement, the plaintiff had released the administrator. The bill was dismissed as to both defendants, and on appeal to this court the decree was affirmed.

The same doctrine had previously been held in *Clason v. Morris*, 10 Johns. 525, wherein, speaking for the court, Spencer, J., said: "I believe not a case can be found in which it is insinuated that where there are two defendants having a joint interest, and one appears and answers, and disproves the plaintiff's case, that the plaintiff can have a decree against the other who had made default, and against whom the bill was taken *pro confesso*. It would be unreasonable to hold that because one of the defendants had made default, the plaintiff should have a decree even against him, when the court is satisfied from the proofs offered by the other, that in fact the plaintiff is not entitled to a decree." See also 2 Barton's Chy. Pr. sec. 240.

The rule, however, as we have said, does not apply where the defence set up by the defendant who answers is not common to all the defendants: as, for example, when the defence is infancy, bankruptcy, and the like. In such case, the decree against those who have made default is not affected, but will remain in full force as against them. And so here the appellee contends that the defence of the statute of limitations is a personal privilege, and to avail must be pleaded by the party who would take advantage of it.

To a certain extent this proposition is undeniable. It is true,

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it is not for the court *ex mero motu* to interpose the defence in behalf of a defendant who does not choose to interpose it for himself. For, as was said by Judge Richardson in *Smith v. Hutchinson*, 78 Va. 683, "the court sits to determine all questions of law and practice under established rules, and not to interpose or plead * * * special defences for defendants, who, by their conduct in failing to appear and make defence, in effect say that they cannot gainsay the plaintiff's right."

But here the interest of the defendants is joint, and the defence set up by the appellant is, that the plaintiff's right of action is barred, not as against him alone, but all the sureties on his principal's bond. And it is difficult to see why the defence thus relied on should not enure to the benefit of all the sureties, and with the same effect, as if, instead of that defence, the appellant had pleaded and proved a release by the plaintiff, or payment in full of the asserted claim, or any other defence going to the foundation of the plaintiff's right to a decree at all. Certainly no authority has been cited to support any such distinction as that contended for by the appellee, and it is perhaps safe to say none can be found.

For these reasons we are of opinion that the decree, so far as it affects the appellant and his co-sureties, is erroneous, and to that extent must be reversed.

DECREE REVERSED IN PART.

Staunton.

S. V. R. R. COMPANY v. MILLER.

OCTOBER 1ST, 1885.

1. APPELLATE COURT—*Objections there—Review.*—Defects in notice, or in service of notice, by sub contractor to owner under mechanics' lien law, can not be objected to for the first time in appellate court. Nor can refusal of court below to award new trial be reviewed, unless all the evidence is in some proper mode certified to appellate court.
2. MECHANICS' LIENS—*Notice—Affidavit—Liability of owner.*—As soon as sub-contractor has furnished labor or materials, he may give notice to owner, and may furnish the affidavit at any time within twenty days after completion of building, or termination of work. And without regard to state of accounts between owner and general contractor, owner, upon proper notice and affidavit, is liable, absolutely, to sub-contractor for amount named in affidavit. Code 1873, chap. 115, § 5, amended Acts 1874-5, p. 437.
3. IDEM—*Statute construed—Two-fold remedy.*—Section 8 secures to sub-contractor benefit of lien given general contractor by section 4, provided notice is given by former before lien is discharged. This remedy is additional to that conferred by section 5, which gives to sub-contractor, upon compliance with its requirements, the right to charge owner personally. Under section 8, regard is had to state of accounts between owner and general contractor; under section 5, none is had.
4. IDEM—*General contractor's failure—Owner's liability.*—Fact of general contractor's failure, and owner's necessity to complete the work, does not affect owner's liability for amount due sub-contractor for labor or materials.
5. EQUITABLE ASSIGNMENTS—*Drawee's liability—Payee's remedy.*—It is well settled, that where one man having funds in another's hands, draws on him an order directing them to be paid to a third party, for value, such order will pass to the payee the title to said funds, which

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title a court of equity will enforce. But drawee may refuse to accept; in which event he is not liable *at law* to payee; but payee may then return order to drawer; or may sue drawer; or may sue in equity for the fund.

Error to judgment of circuit court of Augusta county, rendered May 20th, 1884, for \$612.81, with interest from October 12th, 1882, and costs, in favor of the plaintiff in the action of assumpsit of S. P. H. Miller *against* The Shenandoah Valley Railroad Company.

Opinion states the case.

W. H. Travers, for the plaintiff in error.

H. St. G. Tucker, for the defendant in error.

LEWIS, P., delivered the opinion of the court.

It appears that in March, 1882, the Shenandoah Valley Railroad Company entered into a written contract with one Julius C. Holmes for the construction of certain depot buildings along the line of its railroad in this state. That during the spring and summer of that year, the defendant in error, who was the plaintiff in the court below, furnished lumber to the contractor, Holmes, which was used in the execution of his contract with the defendant company. That on or about the 10th of October, of the same year, the said contractor failed, and thereupon, pursuant to the contract between the parties, the company, through its chief engineer, took charge of the work, and soon thereafter completed it. That about the time of the contractor's failure, various orders were drawn by him on the company in favor of third parties, for valuable consideration, of which the company had notice, though the same were not accepted by the company. That at the time the company took charge of the work it owed the contractor \$1,200, which at the time of the trial of the present action in the lower court had been re-

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duced to \$700. That at the time of the contractor's failure he was indebted to the plaintiff, for lumber so furnished, in the sum of \$612.81. That soon thereafter, and before the completion of the work by the company, the plaintiff delivered to the company a notice in writing, verified by affidavit, of which the following is a copy:

“October 12, 1882.

Julius C. Holmes, general contractor.

In account with S. P. H. Miller, furnisher of materials.

Virginia—Roanoke county, s. c.:

This day, before me, the undersigned, notary public in and for said county, the said furnisher of materials, S. P. H. Miller, made oath that the above account of \$612.81, against the said general contractor, Julius C. Holmes, is true and unpaid, and is due to him from the said general contractor for materials furnished for the following depots along the line of the Shenandoah Valley railroad, to-wit: For freight depot at Waynesboro, \$67.20; for freight depot at Lofton, Augusta county, \$34.48; for freight depot at Buchanan, Botetourt county, \$238.56; for passenger depot at Glenwood, Rockbridge county, \$157.30; for freight depot at Midvale, Rockbridge county, \$50.57; for depot platform steps at Waynesborough, \$12; \$52.60 for depot on the line in Virginia, not now known, all of which amounts are itemized, but not in account attached hereto, under a sub-contract between sub-contractor and said general contractor, under a contract between the latter and the said owner. Given under my hand, this 13th day of October, 1882.

(Signed.) LUCIEN H. COCKE, N. P.”

And to this notice was appended the following:

“I, the said sub-contractor, S. P. H. Miller, hereby certify my intention to claim, for the amount of the above account,

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\$612.81, on the above described buildings, the benefit of the lien provided by the Code of 1873, chapter 115, and the acts amendatory thereof. Given under my hand, this 13th day of October, 1881.

S. P. H. MILLER, Sub-contractor."

"To the Shenandoah Valley Railroad Company.

Owner of the above described property is hereby notified, that I shall hold it liable for the above account. Given under my hand, this 13th day of October, 1882.

S. P. H. MILLER, Sub-contractor."

And upon the foregoing appears the following endorsement :

"Delivered copy of the within to W. W. Coe, chief engineer S. V. R. R., in his office at Roanoke, Oct. 13th, 1882.

(Signed.) S. P. H. MILLER."

"Subscribed and sworn to by S. P. H. Miller, before me, this 18th day of Feb., 1884.

(Signed.) JOSEPH B. WOODWARD, N. P."

Payment of the above account not having been made, the present action was instituted against the company, to which it appeared, and issue was joined on the plea of *non-assumpsit*. The case having been heard, a verdict and judgment were rendered in the plaintiff's favor for the sum of \$612.81, with interest thereon from the 12th of October, 1882, until paid, and costs. And thereupon the defendant applied for and was awarded a writ of error and *supersedeas*.

The first objection urged is, that the written notice of the plaintiff to the company was not served in accordance with the terms of the statute, which enacts as follows: "It shall be sufficient to serve any process against, or notice to a corporation, on its mayor, rector, president, or other chief officer, or in his

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absence from the county or corporation in which he resides, or in which is the principal office of the corporation, against or to which the process or notice is, if it be a city or town, on the president of the council or board of trustees, or in his absence, on the recorder or any alderman or trustee; and if it be not a city or town, on the cashier or treasurer; and if there be none such, or he be absent, on a member of the board of directors, trustees or visitors. * * * *. Service on any person under this section, shall be in the county or corporation in which he resides; and the return shall show this, and state on whom and when the service was, otherwise the service shall not be valid." Code 1873, ch. 166, sec. 7.

It is insisted that, inasmuch as the return in the present case does not show that the chief engineer, upon whom the notice was served, *resided* at the time of service at Roanoke, the service is insufficient, and therefore that the plaintiff has not brought himself within the provisions of the statute under which his claim is asserted, namely, the statute commonly known as the "mechanic's lien law."

It is also objected that the affidavit accompanying the notice in the present case is defective, because not in compliance with the last-mentioned statute, which requires the affidavit to show "a correct account of the amount due" the sub-contractor by the contractor. And in support of this objection, reference is made to the recent case of *Shackleford v. Beck*, ante p. 573.

In that case, it is true, this court held, construing the 4th section of chapter 115 of the Code of 1873, which requires a general contractor, in order to avail himself of the lien given by the preceding section, to render on oath "a true account of the work done or material furnished," that the rendering of a mere statement, showing the balance claimed to be due the contractor, was not a sufficient compliance with the terms of the statute, but that the *items* of the account must be furnished; or, in other words, the contractor must "give a bill of particu-

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lars, whereby all who may be interested can ascertain not only the amount demanded, but the correctness or reasonableness of the demand." This, said Judge Fauntleroy, speaking for the court, the statute prescribes in clear and unmistakable language, and as no such lien as that provided for by this statute is known to the common law or to courts of equity, but "is purely a creature of the statute, it must be availed of, if at all, upon the terms and conditions which the statute prescribes."

Such was this court's construction of the section then under review; that section requiring "a true account" to be furnished, and the fifth section, under which the plaintiff in the present action proceeded, requiring "a correct account," etc. And while the construction thus placed upon the fourth section must be considered as the law of the state and respected as such, yet we are of opinion that under the circumstances neither of the objections to which we have referred can be sustained in the present case. Neither was made in the court below; but both are for the first time raised in the appellate court. If the company desired to rely upon them, it should have brought them to the attention of the circuit court; and not having done so, clearly it is now too late to raise them here. The object of the notice is to apprise the owner of the sub-contractor's claim, and to warn him against making payment to the general contractor. And if the notice be for any reason defective, or if it be not properly served, it is the undoubted privilege of the owner in a suit or action against him by the contractor, to defend on that ground. But these defects or objections he may waive, as in the present case was done by the defendant in not objecting in the circuit court to the introduction in evidence before the jury of a copy of the written notice served by the plaintiff, with the return thereon; and having thus waived them there, the right to insist upon them now is gone. *Powell on Appellate Proceedings*, p. 336, § 66; *Ballard v. Whitlock*, 18 Gratt. 235; *Dillard v. Thornton*, 29 Id. 392.

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The subject of the next assignment of error is the refusal of the circuit court to give to the jury certain instructions asked for by the defendant. The first is as follows:

“If the jury believe from the evidence that Julius C. Holmes contracted with the Shenandoah Valley Railroad Company to construct for it certain depot buildings, the said contractor to furnish all the necessary material and labor therefor; that the said company was to retain a part of the contract price as security for, and until the completion of all the said buildings, and the said plaintiff contracted with the said Holmes to furnish materials for the said buildings or any of them, then the plaintiff is not entitled to recover unless they shall further find from the evidence:

“1. That the plaintiff, after the completion of the last of the depot buildings to be constructed by Holmes, and within twenty days from such completion, gave notice in writing to the said defendant of the value of the materials furnished by him.

“2. That within twenty days from said completion, the plaintiff furnished the said company with an affidavit, showing a correct account of the amount due him by the said Julius C. Holmes.

“3. That at the time of the service of the notice aforesaid by the plaintiff on the defendant, there was money due, or afterward became due, to the said Holmes by the said company under his said contract with the said company.”

The principal question sought to be raised by this instruction was, that the notice and affidavit required by the statute, to entitle the sub-contractor to the benefit of its provisions, must, in order to have that effect, be furnished *after*, and not before the entire completion of the work by the general contractor. Obviously, this is not the true construction of the statute.

By an act, approved March 31, 1875, sections 4 and 5 of ch. 115 of the Code were amended and re-enacted; and section 5 as amended, under which the notice and affidavit in the present

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case were furnished, provides as follows: "Any sub-contractor, or any person contracting to furnish materials about a building or other improvement, for a general contractor, or other person than the owner, may give notice in writing to the owner of such building or other improvement, stating the value of the labor performed or materials furnished, and shall, within twenty days after such building or other improvement is completed, or the work thereon otherwise terminated, furnish the owner thereof with an affidavit showing a correct account of the amount due to said party by the contractor and remaining unpaid to the sub-contractor or person contracting to furnish materials, and the said owner shall be liable for the amount of such claim to said sub-contractor or person contracting to furnish materials: provided, the same does not exceed the amount named by the said claimant in the affidavit hereinbefore required; and in that event, the owner of the building or other improvement shall be liable to the claimant for the amount named in said affidavit, and no more." Acts 1874-75, p. 437.

It is plain from the language thus employed, that the intention of the legislature was to authorize notice to be given after the materials have been furnished by the sub-contractor, and to prescribe a limitation within which the essential affidavit "showing a correct account of the amount due" to the sub-contractor shall be furnished, namely, twenty days after the completion of the work, and no longer. In other words, the sub-contractor may give notice as soon as the materials are furnished, and may at the same time, if he please, furnish the required affidavit, or at any time thereafter, provided the same is furnished within twenty days after the work is completed. If he delays furnishing the affidavit until after the expiration of that time from the completion of the work, then his right to avail himself of the benefit of the fifth section of the statute is gone. This construction is not less favorable to the owner than that contended for by the company, as it apprises him in ad-

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vance of the completion of the work of the claim of the sub-contractor, and certainly the language of the statute admits of no other reasonable interpretation.

In *Roanoke Land and Improvement Co. v. Karn & Hickson*, ante p. 589, Judge Lacy, in delivering the opinion of the court, said: "When the labor has been performed and the materials furnished, the notice may be given and the affidavit furnished *at any time* within twenty days after the building has been completed. This is the termination provided by law; there is no other."

Nor does the third clause of the instruction which was asked for by the defendant correctly propound the law. The language of the statute is explicit, that when notice has been given and affidavit furnished, "the owner *shall* be liable for the amount of such claim" to the sub-contractor absolutely, "provided, the same does not exceed the amount named by the said claimant in the affidavit (?) hereinbefore required: and in that event, the owner of the building or other improvement shall be liable to the claimant for the amount named in the said affidavit (?), and no more." Doubtless the word "affidavit," as it here occurs in the amended statute, was by inadvertence inserted in place of the word "notice," as it appears in the original statute, in the Code, ch. 115, sec. 5. At all events, it is very clear that the liability of the owner to the sub-contractor, after proper notice has been given and affidavit furnished, is not dependent upon the state of the accounts between the owner and the general contractor at the time such notice and affidavit is furnished, or at any time thereafter. And therefore the circuit court very properly refused to instruct the jury that the plaintiff could not recover unless they were satisfied, from the evidence, "that at the time of the service of the notice as aforesaid by the plaintiff on the defendant there was money due, or afterward become due, to the said Holmes by the said company under his said contract with the said company."

Nor is this view opposed by anything contained in the sixth

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section of the statute, which provides, that if the account of the sub-contractor be furnished the owner, and is approved by the general contractor, or if after ten days notice to the latter of the filing of the said account with the owner, he shall fail to file with the owner any objection to the account, in either case the owner may pay the amount to the sub-contractor, and shall then be entitled to a credit for the amount so paid upon whatever may be due by him to the general contractor. Manifestly, it was not the object of this section in any way to affect the personal liability which by the preceding section is imposed upon the owner, in case the requisite notice and affidavit are furnished as provided by that section; but out of abundant caution, and as a matter of obvious justice to the owner, to declare, in express terms, his right to be credited, in his settlement with the general contractor, with any sum paid by him to the sub-contractor in pursuance of the provisions of this act.

Reference is also made to the eighth section; but it is equally plain that its provisions have no bearing on the question before us. It enacts that the lien of the general contractor, given by the fourth section, shall enure to the benefit of the sub-contractor or material man, to whom the general contractor may be indebted for work or materials, "provided, said sub-contractor, workman or other person, shall furnish notice to the owner of his claim against the general contractor before the amount of such lien is actually paid off and discharged."

By this section provision is made for securing to the sub-contractor the benefit of the *lien* which may have been acquired by the general contractor, provided, notice is given by the former before the lien is discharged. But the provision thus made is wholly independent of the provisions of the fifth section, which gives to the sub-contractor, after complying with its requirements, the right to charge the owner personally. In other words, the right conferred by the eighth section is in addition to that conferred by the fifth. But no *lien* can be acquired by the sub-contractor unless the requisite notice, which in this in-

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stance is not required to be supported by affidavit, is given before the lien in favor of the general contractor has been paid off and discharged; whereas, under the fifth section, the sub-contractor may hold the owner personally liable, whether he has settled in full with the general contractor or not.

And, since the language of the statute is plain, it is needless to look beyond it, or to speculate as to the policy which the legislature had in view. Enough, however, has been said to show that the theory of the statute is, that the party furnishing materials for the erection or repair of buildings on credit retains a claim to them after they have gone into the building; and, accordingly, ample remedies are provided to enable him to enforce it. Nor does this work injustice to the owner, who may protect himself by requiring security of the general contractor with whom he contracts, and through whom he impliedly contracts with those who furnish their labor, skill and materials, for the erection or repair of his buildings.

And it matters not that the general contractor, as in the present case, may fail and thereby become unable to proceed with the work, in consequence of which the same is completed by the owner himself. The claim of the sub-contractor is none the less meritorious on that account, nor any the less enforceable under the terms of the statute. The circuit court, therefore, very properly refused to give to the jury the second and last instruction asked for by the defendant, which is as follows: "The plaintiff is not entitled to recover, if the jury believe, from the evidence that the defendant contracted with Julius C. Holmes to construct the depot buildings for which the plaintiff furnished materials, and that it was a covenant of the said contract that the engineer of the defendant should at any time, when in his opinion, on account of the refusal or neglect of the said Holmes to prosecute said work with sufficient force to complete it within contract time, it was necessary to employ hands to complete the construction of the said buildings and pay them, and that in the exercise of such right the said engineer em-

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ployed laborers to finish the said buildings, and expended in completing, or towards completing the same, the sum remaining due to the said Holmes, under his said contract with the defendant, or that the said defendant, before notice of the claim of the plaintiff as aforesaid, had notice of orders given by the said Holmes upon it sufficient with the sum required for the completion of the said buildings to absorb the full contract price for the construction of the said buildings by the said Holmes."

We have already seen that the right of the sub-contractor to charge the owner is not dependent upon the state of the accounts between the owner and the general contractor. But it may be further observed, in respect to this instruction, that it announces, as a proposition of law, that the sub-contractor is bound by the contract between the owner and the general contractor, although he may have no knowledge of the terms of the contract, or that any express contract between the parties had ever been entered into at all; which is clearly not the law of this State, however it may be elsewhere. Moreover, the instruction is faulty, in that it assumes that the mere notice by the company of the fact that orders had been drawn upon it by the general contractor, before it received notice of the sub-contractor's claim, absolved the company from liability to the sub-contractor, at least to the extent of the order so given. The instruction is founded on the theory that the orders operated as equitable assignments *pro tanto* of the moneys due by the company to the general contractor, and bind the company, whether accepted by it or not. But such is not the law. It is well settled, that where one man, having funds in the hands of another, draws an order upon the latter directing them to be paid to a third party, for valuable consideration, such order, according to the doctrine of equitable assignment, will pass the title to the payee. "But," as was said by Judge Tucker, in *Brooks v. Hatch*, 6 Leigh, 534, "the drawee, though he is the drawer's debtor, is not bound to accept his draft against his own will. The creditor has no right to compel his debtor to

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become debtor to another man—(our statute authorizes this only in the case of assignments of assignable securities). The drawee may, therefore, refuse to accept; and in that case, *he* is not liable to the payee at all. * * * And if acceptance of the order be refused, three courses remain for the holder: he may either return it, in which case the parties are in *statu quo*; or he may sue the drawer upon it, the drawee having refused to accept it; or he may retain it, give notice to the person on whom it is drawn, not to part with the fund, and sue in equity for its recovery.”

The same doctrine is held in the *First National Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555, where it is said: “When a person having a demand due him assigns part of it to different persons, whether by separate orders in their favor or otherwise, they are valid equitable assignments *pro tanto*, and though, if the orders are not accepted, a court of equity will in no manner recognize these partial assignments or orders as equitable assignments, yet a court of equity in a suit in chancery will recognize and enforce them.” See also 2 Story’s Equity, sec. 1043, *et seq.*

But suppose, in such a suit in chancery, the drawee, not having accepted the orders, as in the present case, defends on the ground that after they were drawn, he was required by the valid judgment of a court of common law to pay the fund on which they were drawn to another person. Can it be doubted that such a defence, if established by proof, would be a complete answer to the suit of the assignee? Both reason and authority answer in the negative. And this being so, it is manifest that, in any view, the instructions asked for by the defendant were rightly refused.

It only remains to say, that the last assignment of error, which relates to the refusal of the circuit court to set aside the verdict, as being contrary to the law and the evidence, is not well taken. It does not appear from the record that the defendant excepted to the action of the court in that particular, nor

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are the facts certified. The bill of exceptions, which was taken to the refusal of the court to instruct the jury as asked by the defendant, sets forth that certain evidence, which is certified, was introduced by the parties respectively; but the certificate does not purport to be a certificate of all the evidence, and this is the only certificate which appears in the record. If the defendant desired the action of the circuit court, in overruling its motion for a new trial, to be reviewed by the appellate court, it should have seasonably excepted, and asked that the facts be certified. But as that has not been done, it is impossible for this court to pass on the merits of the motion, and the action of the lower court must be presumed to have been right.

JUDGMENT AFFIRMED.

Staunton.

LINKENHOKER v. GRAYBILL.

OCTOBER 1ST, 1885.

LEWIS, P., absent.

1. **EASEMENTS—Ways—Dominant and servient lands.**—Easements follow land into assignee's hands. Division of dominant tract does not destroy easement. Owner of any portion may claim right so far as applicable to his portion; provided division does not impose additional charge on servient tracts.
2. **IDEM—Way *ex necessitate*.**—If one take conveyance of land surrounded by lands of his grantors and others, he can enforce a right of way under plea of necessity against none but his grantors.
3. **IDEM—Case *at bar*.**—L. bought part of the R. lands knowing how they were situated as to public roads, and that they were entitled to a right of way in one direction over G.'s lands to a public highway, and contracted with his grantors for a right of way out to a public highway over other lands than G.'s. He cannot now be permitted to abandon his said rights of way and have a public road established for his own exclusive use, and to the great damage of G., over G.'s land in another direction to a public highway.

Appeal from judgment of circuit court of Botetourt county rendered may term, 1885, refusing to establish on the application of M. P. Linkenhoker, a certain road from his tract through the land of Michael Graybill, to a public highway.

Opinion states the case.

G. W. & L. C. Hansbrough, for the plaintiff in error.

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Glasgow & Glasgow, for the defendants in error.

FAUNTLEROY, J., delivered the opinion of the court.

The tract of land owned by M. P. Linkenhoker, the appellant, to which he is, in this proceeding, seeking to have a public road established over and through the land of M. Graybill, appellee, is the southern portion of the tract which was assigned to Mrs. Susan M. Radford, in the division or partition of the lands of her father, John Preston, deceased, lying north of the town of Amsterdam, in the county of Botetourt, Virginia; and it is part of that which was assigned to Mrs. Mary R. Copland, daughter of Mrs. Susan Radford, in the division of the latter's estate, and which was afterwards conveyed by Peter Copland and Mary R., his wife, to appellant, by deed dated 25 July, 1878. Lying south of the aforesaid Susan Radford tract, is the farm now owned by the appellee, M. Graybill, containing 361 acres, which was conveyed to the said appellee, Graybill, by deed from F. T. Anderson and wife, dated December 15th, 1854.

Appellant's tract of land, lying above, is, practically, in the shape of an isosceles triangle, with the base-line on the north, resting on the residue of the land assigned as aforesaid, to Mary R. Copland, out of said Susan Radford's estate; and with the other two sides adjoining, on the east and on the west, the lands of Graybill, appellee; the said triangular tract of appellant running south to the vertical angle, jutting down into the said Graybill's land, and lacking only the distance of the proposed road, 65½ poles, of cleaving his said farm in two.

The prayer of the appellant is, that this court will reverse the decision of the county and circuit courts of Botetourt county, which courts refused to establish a *public* road over and through appellee's land, in favor of that part of the Radford land which is owned by the appellant, containing 93 acres and 92 poles.

From the record it appears that there is, appurtenant to the

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Radford land, a part of which is the $93\frac{1}{4}$ acre tract of appellant, a right of way toward the east, out by the graveyard, to the Fincastle and Franklin turnpike, over and through the land of the appellee, Graybill, a distance of 80 rods; and this right of way in favor of the Radford lands is referred to and reserved in a note appended to the deed under which the appellee, Graybill, derives and holds his title from F. T. Anderson and wife, dated December 15th, 1854; and that, in the deed from Copland and wife, dated July 25th, 1878, conveying this tract of $93\frac{1}{4}$ acres of the Radford tract to the appellant, M. P. Linkenhoker, the grantors guarantee to the said Linkenhoker a right of way out, west, over and through the other part of the said Radford lands retained by Mary R. Copland, to a public road. After this conveyance was made, the creditors of W. M. Radford asserted their claims against his estate, and his lands were sold for the payment of his debts, which necessitated a separate division of the lands owned by Mrs. Susan Radford. Accordingly, in November, 1879, a new commission made division of her land; and in their report they adopt that portion of the former division, which assigned this $93\frac{1}{4}$ acres, now the Linkenhoker tract, to Mary R. Copland, and provide, distinctly, that "the present road passing through the farm shall be a right of way to the heirs having possession thereof;" and this road is the continuation of the road reserved in Graybill's deed from Anderson and wife, in favor of the Radford lands, a part of which is the $93\frac{1}{4}$ acre tract now held by the appellant, Linkenhoker.

From the evidence it appears, that the farm owned by the appellee, Graybill, which would be cut into two separate and disconnected parts, on different sides of the proposed public road, is a very valuable grazing farm, most admirably adapted to grazing and stock raising, and complete in all its appointments and arrangements for that purpose; with pasture lands, woodlands for shade, and water, all in proper and essential relation to each other; all of which would be broken up, as well

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as the commercial value of the farm very greatly impaired, by the proposed public road cutting it into disconnected parts. It appears, from the record, that the farm of the appellee is already bounded or intersected by three public roads; while the whole Radford lands, of which appellant's 93 $\frac{1}{4}$ acre tract is a part, has no burthen of this sort to bear, except that, for a short distance, on the west side of the whole estate, it is bounded by a public road.

In purchasing his tract of 93 $\frac{1}{4}$ acres from Copland and wife, appellant required his grantors to covenant with and guarantee to him, a right of way out, by a route along the outside line of the Radford lands, in a westerly direction, to a public road; and to establish which, the damage to the Radford land would be only the value of the land taken for the road, and in no degree commensurate with the injury, damage and loss which would be inflicted upon appellee by cutting his farm in twain by a public road; which the evidence in the cause, and, indeed, the report of the *viewers*, appointed by the court, of the proposed site of the road through the land of the appellee, explicitly and unqualifiedly say, will be of no *public* use or benefit, and will be only for the use and benefit of the appellant.

But, if the appellant's grantors had not guaranteed a way out; and if there were not appurtenant to the land, the old, immemorial right of way, reserved by the commissioners as aforesaid, the Radford lands, of which appellant's 93 $\frac{1}{4}$ acre tract is a part, ought to bear the burthen of a way out, *ex necessitate*, claimed by the appellant. "If a person voluntarily take a conveyance of land, which is surrounded, on all sides, by lands of his grantors and others, he can enforce this right of way under plea of necessity, against none but his grantor." 1 Lomax Dig., marginal page 528; *Kimball v. Cochecho R. R. Co.* 27 N. H. 448; 59 Amer. Decis. 387; 35 Amer. Decis. 302. "A way over the grantor's lands exists, to a close granted, as incidental to the grant." 1 Lomax Dig. marginal p. 527.

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The record shows that the Radford lands had an easement—a right of way—over the lands of appellee, in an easterly direction, to a public highway, the Fincastle and Franklin turnpike; and when appellant bought his 93½ acre portion of those lands, he knew the situation of the tract with reference to the public roads, and he contracted with his grantors for a right of way out; and he is not now to be permitted to abandon this right, and to cut his neighbor's farm in two, by a public road, ostensibly, but which cannot be of any possible public use or concern, regardless of the injury, expense or inconvenience which it may inflict upon that neighbor's lands, with whom and whose lands, he, nor his land, has no relation or affinity derived from a common grantor.

Easements follow the land into the hands of an assignee, and “the division of the dominant estate does not destroy the easement; and the owner or assignee of *any portion of* that estate may claim the right so far as it is applicable to his part, provided the right can be enjoyed as to the separate parcels, without any additional charge upon the servient tenement.” *Hills v. Miller*, 3 Paige (Ch. N. Y.) 254; 24 Amer. Decis. 218. “Where land is granted with a right of way, that right is appurtenant to *every part* of the land thereafter granted.” *Watson v. Bioren*, 1 Sergeant & Rawle, (Pa.) 227; 7 Amer. Decis. 617. “Where a judgment creditor levied on a part of the debtor's lands, leaving the latter no passage from the remaining portion to the highway, the debtor has, necessarily, a right of way over the land levied upon.” *Pernam v. Wead*, 2 Mass. 203; 3 Amer. Decis. 43; *Taylor v. Townsend*, 8 Mass. 411; 5 Amer. Decis. 108. “Grant of continuous and apparent easements is implied on *severance of heritage*, where, though having no legal existence as easements, they have in fact been used by the owner during the unity of heritage, or when they are necessary to the full enjoyment of the several portions of the heritage.” *Elliott v. Rhett*, 5 Richardson, (S. C.) 405; 57 Amer. Decis. 750: note to

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Elliott v. Rhett, 57 Amer. Decis. 767, citing *Burwell v. Hobson*, 12 Gratt. 322, and others.

We are of opinion that the judgment of the court below, complained of, should be affirmed, and it is so ordered.

RICHARDSON, J., dissented.

JUDGMENT AFFIRMED.

Staunton.

TURNER v. DAWSON & ALS.

OCTOBER 8TH, 1885.

1. REALTY—*Sale for partition—Proceeds.*--Where court of equity causes land to be sold for partition, it leaves it to the party entitled to the proceeds, to designate whether he will hold them as personalty, or as realty. And when, for any reason, that party is incapable of making such designation, the court will hold them subject to all the incidents of realty.
2. IDEM—*Case at bar.*—D.'s land was sold for partition, in suit for that purpose. One-third of proceeds was set apart for widow. D.'s daughter, A. was of age, unmarried, and a party to the suit, and afterwards married T., and, without having had issue, died in widow's lifetime. After widow's death, T. sued to recover share of A., his deceased wife, in the third—claiming it had been converted into personalty. There was no evidence that A., whilst *sui juris*, ever elected, or that any election for her in her lifetime, whilst she was *non sui juris*, had been made, that said third should be personalty.

HELD:

1. Said third of proceeds of sale in D.'s land is realty.
2. A.'s share passes to her next of kin.
3. Her widower has no interest in it.

Argued at Richmond, and decided at Staunton.

Appeal from decree of circuit court of Albemarle county, rendered May 15th, 1883, in the chancery cause under the style of Andrew J. Dawson *against* B. H. Dawson and others. From this decree Peter P. Turner obtained an appeal to this court.

Opinion states the case.

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Watson & Perkins, for the appellant.

Thomas S. Martin and *Duke & Duke*, for the appellees.

RICHARDSON, J., delivered the opinion of the court.

Benjamin Dawson died intestate in the year 1853, leaving a widow and children, and, at the time of his death seized of a tract of about 100 acres of land in the county of Albemarle with a mill thereon. All of the children of the decedent except one, an infant, were adults and *sui juris*.

In the same year of the intestate's death one of the adult heirs, Andrew J. Dawson, filed his bill against Agnes C. Dawson and the other heirs for partition of the real estate by sale. On the 22d day of October, 1853, a decree was rendered in the cause, holding "that the real estate in the bill mentioned cannot be conveniently partitioned among the heirs at law of the said Benjamin Dawson, deceased, and their interests would be promoted by the sale thereof," and decreed a sale thereof, for the purpose of partition. The land was sold under that decree, and the sale was confirmed on the 27th day of October, 1853, for near \$8000. Of the proceeds of the sale, \$2610.60 was set apart for the widow, the interest on which she accepted and enjoyed during her life in lieu of her dower, and said principal sum is now under the control of the court; and the interest therein of one of the heirs, Agnes C. Dawson, who afterwards intermarried with the appellant, Turner, is the subject of controversy in this suit.

At the time of the sale of said real estate, Agnes C. Dawson was over twenty-one years of age and unmarried. She was married to the appellant on the 8th day of November, 1855, and died in October, 1878, leaving her mother, the dower tenant, surviving her, and without ever having borne a child; and leaving also surviving her, the said Peter P. Turner, her husband, who claims that the \$2610.60, now under the control of

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the court, was, by the sale of said land, converted from realty into personalty, and that his wife's share therein passes to him; whilst the next of kin of Mrs. Turner claim that, for the purpose of distribution, said sum still bears the impress of realty, and that Mrs. Turner's share therein passes to them. This is the sole question in the case.

The widow of Benjamin Dawson having died in January, 1882, at the May term, 1882, of the court below, the appellant, Turner, filed his petition in said suit of Andrew J. Dawson *against* B. H. Dawson and others, asking that the share of his deceased wife, the said Agnes, in said fund, it being the one-fifth part thereof, as well as a certain legacy of \$100 which had been bequeathed to his said wife by her sister, Mrs. Thurmond, out of *her* share of the said dower fund, might be paid to him as the administrator and sole distributee of his wife. On the 15th day of May, 1883, the cause came on and was heard by the circuit court of Albemarle county, when a decree was therein pronounced by said court holding that the next of kin of Mrs. Turner were entitled to her share to the exclusion of the said Peter P. Turner. From that decree the case is here on appeal.

The precise question here involved has never been decided by this court. It must therefore be considered upon principle and by analogy to kindred propositions adjudicated in this state and elsewhere.

In the eye of the common law the ownership of land has ever been regarded with a peculiar sacredness not incident to the ownership of mere personalty. "Upon the introduction of the feudal law into *England*, all lands became holden, either by a free tenure, or in villenage. The tenant who held by a free tenure had always a right to the enjoyment of the land for his life at least, and could not be dispossessed, even for the non-payment of his rent, or the non-performance of his services; whereas, the tenant who held in villenage, might be turned out at pleasure by his lord, and his possession, being

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perfectly precarious, was considered to be the possession of his lord, to whom he was, in a great degree, a mere slave. The person thus holding land by a free tenure, was, therefore, called a *freeholder*, because he might maintain his possession against his lord: and for this reason, *liberum tenementum* or *freeholder* was opposed to villenage." 1 Lomax Digest, 4. And the acquisition of an estate of freehold was attended with certain valuable rights and privileges. The freeholder became a member of the county court, one of the *pares curiæ* in the Court Baron, or Lord's Court, was entitled to be summoned on juries in the King's Court, and to vote at the election of a knight of the shire. So "estates of freehold" are either estates of inheritance, or estates not of inheritance. Freehold estates of inheritance are divided into inheritances absolute or fee simple, and inheritances limited. Of the former quality and quantity of estate, in land, Benjamin Dawson was seized at his death, and dying intestate, the estate so held by him descended to his heirs at law unfettered.

Moreover, with the full establishment of the feudal system in England, all lands were, by universal acknowledgment, held mediately or immediately of the king; and thus, not only privileges and dignities become incident to the ownership of land, but the great feudal lords, as well as their tenants and retainers, were erected into a powerful military system, founded upon the idea of permanent interest in and attachment to the soil.

In this connection, too, may be mentioned the English law of entail, evidencing the fixed purpose of the English people to make permanent the tenure of real estate. Hence, it was well remarked in argument, by counsel for the appellees, that it is a prominent characteristic of English civilization for land to go with the blood of him who acquires the right of property therein. Perpetuities are repugnant to our institutions, and hence estates tail were abolished, in Virginia, as early as 1785; but, in a modified form, so far as consistent with our institutions, we can yet trace, in our laws respecting real estate, many

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of the ancient landmarks, attesting the attachment which our people have to the idea that land should run with the blood. This is strongly exemplified by the course of descents prescribed by our statute, ch. 119, § 1, by the tenth and last clause of which it is declared: "If there be no father, mother, brother, or sister, nor any descendant of either, nor any paternal kindred, the whole shall go to the maternal kindred; and if there be no maternal kindred, the whole shall go to the paternal kindred. If there be neither maternal nor paternal kindred, the whole shall go to the husband or wife of the intestate; or if the husband or wife be dead, to his or her kindred, in the like course as if such husband or wife had survived the intestate and died entitled to the estate." Thus, it is only in the last resort that land passes by descent from or to husband or wife. All this is in recognition of the right of blood on the side from which the land comes.

From what has been said, very naturally comes the well recognized equitable doctrine, that money agreed or directed to be laid out in the purchase of land, is considered in equity as land, because there, whatever is agreed to be done is considered as actually done. Where money, directed to be laid out in the purchase of land, comes into the hands of the person who would have had the absolute property of the land, in case a purchase had been made, it will be considered as money, and may be claimed accordingly. But when it is in the hands of a third person, some act must be done by the person entitled to it to show that he considers it as money, otherwise it will still be deemed land. See 1 Lomax Dig. 2, and authorities cited.

The last branch of the doctrine above stated is appropriate to the case in hand, and was recognized and applied by this court in the case of *Ashby v. Smith and wife*, 1 Rob. R. 59. In that case the testator, an inhabitant of Frederick county, Virginia, directed by his will that the tract of land on which he lived be sold by his executors, at such time and upon such terms as they might think would be best for his heirs; that the

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proceeds be applied to the purchase of other lands upon the most advantageous terms, either in the state of Kentucky, or some other part of the western country, that his executors might think would be most to the general interests of his heirs; and that the lands so purchased should be divided amongst his five daughters and two sons—each of his daughters to have four hundred acres, and the residue to be equally divided between the two sons; all of which divisions he desired should bear an equal proportion to each other in respect to the quality of the land. The testator appointed his wife executrix, and one of his sons executor. The son qualified as executor a few months after the testator's death, and the widow died about two years afterwards. The husband of one of the daughters purchased the right of another daughter, and the three other daughters sold their rights to the son who was executor. In 1816, ten years after the testator's death, the husband and wife filed a bill to compel the executor to execute the trust by selling the lands and distributing the proceeds. In 1827, a supplemental bill was filed, setting forth that in 1817 a sale was made, but the executor had taken no further step towards executing the trust; and praying that the plaintiffs might have a decree for their proportion of the proceeds of sale. The executor answered, that he had always been ready to purchase land in the western country for the complainants. It was held on appeal,—1. That, as the trustee had improperly delayed the execution of the trust, until a great change had taken place in the situation of the western country, and the circumstances of the parties, the beneficiaries ought not then to be compelled to take lands in the western country, but should be allowed to take their just proportion of the money arising from the sale of the Frederick lands; and that the principle of equity in the division of the said money is in this case just and proper. 2. That the female complainant's portion of the money arising from the sale of the lands should be so secured and protected, as to prevent its being subjected to the control or

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debts of the husband to a greater extent than if it were land, unless the wife should consent that the money be paid to the husband absolutely; as to which she ought to be privily examined, separately and apart from her husband, in the same manner as in the conveyance of her real estate. In delivering the opinion in that case, Judge Cabell said: "This court therefore approves of the decree of the chancellor in establishing the right of the beneficiaries to elect to take money instead of land, and in directing an equal division of the fund among the parties. But the decree is defective in not having so secured and protected Mrs. Smith's portion of the money arising from the sale of the Frederick lands, as to prevent its being subjected to the control or debts of the husband to a greater extent than if it were land; in which case, the husband would be only entitled to the profits during the coverture, or for his own life as tenant by the curtesy, in case he survived the wife, having had a child by her, born alive; for this money, being in lieu of land to which the wife was entitled, ought to be regarded as land, and treated accordingly, unless indeed the wife should consent that the money should be paid to the husband absolutely, as to which she ought to be privily examined, separately and apart from her husband, in the same manner as in the conveyance of her real estate."

It is obvious that, upon principle, the above remark of Judge Cabell completely meets and refutes every point taken in favor of the appellant's claim in this case. In that case, as in this, the land had been sold and money taken in lieu thereof. The money thus held represented, in that case, land devised by the testator to be sold and the proceeds reinvested in other lands for the devisees; and the trustees having for many years neglected to execute the trust, and having at last sold the land devised to be sold, after bill filed to compel the execution of the trust, and after the changed condition of the parties and circumstances rendered a strict compliance with the testator's directions not only impracticable, but inequitable, the court, upon

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equitable principles, interposed for the best interests of the devisees, considered and treated the money thus held by the executor as land, and, upon the principle that equality is equity, decreed a distribution accordingly. But the court below having neglected to secure the distributive share of Mrs. Smith, a *feme covert*, against the control and debts of her husband, this court, in that respect, reversed the decree of the court below, holding that the interest of the *feme covert* devisee was in the nature of and must be treated as land, and that her rights in respect thereto must be protected accordingly, unless relinquished by her in the mode prescribed by statute for the conveyance of the real estate of a married woman.

For precisely the same reason, though under somewhat different circumstances, not affecting the application of the principle involved, the fund in dispute here must be considered and treated as *land*. Benjamin Dawson died intestate, seized of *land*, and Agnes Dawson inherited *land*. The land thus inherited by Agnes and the other heirs was not susceptible of partition in kind, and for that reason alone one of the heirs (not Agnes,) brought suit for partition by sale, as the only way in which *partition* could be effected. The cause having been regularly matured, and *depositions taken* (of course to establish the fact that the land was not susceptible of partition in kind), the court decreed the land to be sold for the purpose of partition. The land brought about \$8000: of this sum, \$2610.60 was set apart, the interest on which the widow took for life, in lieu of her dower. The widow was the survivor of her said daughter Agnes by several years. Agnes was *sui juris* when the land was sold. She did not marry for some four years after the sale. For the whole of that period she was capable of so doing, and might have disposed of her share or interest,—as well in the sum set apart for dower purposes (though she could not demand her interest therein until her mother's [the widow's] death), as of her interest over and above the fund set apart for dower purposes. But she did no act during the time she thus re-

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mained *sole*, which changed the character of her inheritance—especially as to her interest in the dower fund now in controversy. During that period there seems to have been a partial distribution of the proceeds of the land, Agnes receiving her portion of the partial distribution. She was *sui juris*, and could by her act treat the amount so received as to her seemed best. After her marriage with the appellant, there seems to have been a further distribution, a decree in the cause showing that the money thus distributed was directed to be paid to the appellant, Turner, and his wife, the said Agnes. These sums were no part of the dower fund, but were the interests of Agnes over and above that. And as to the sum directed to be paid to her husband and her, after her marriage and during coverture, it is clear, upon the doctrine laid down in *Ashby v. Smith*, *supra*, that it could not be paid to Turner, the husband, unless by her consent, ascertained by privy examination, as required in the case of a conveyance of her real estate by a married woman.

But it is insisted, by counsel for the appellant, that the sale of the land of Benjamin Dawson, inherited by his heirs, was by the consent of Agnes Dawson, a person *sui juris*, and that the sale worked an absolute conversion.

The original record, except the decrees rendered in the suit for partition, has been lost or destroyed. We can, therefore, know but little of the particulars. It is sufficient to say, that there is nothing to show that she did consent. In fact, she did not bring the suit; it was brought by another of the heirs, and she was thus brought into court, it may have been, against her consent. Of this we have no means of judging. But suppose she had consented, her consent could only be taken as extending to the only practicable way of having partition of the land inherited by her and the other heirs. Moreover, there could have been no valid consent amounting to an agreement to sell and convert real estate into personalty, because one of the heirs was at the time of the sale an infant, incapable of consenting. We are bound, therefore, to presume that the depositions refer-

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red to in the decree for sale were not mere affidavits, as contended by counsel for the appellant, but were depositions, in fact, required by the court before it would compel this mode of partition of real estate, a mode authorized by statute only when partition in kind cannot be conveniently effected, or is not practicable. In no view has Agnes Dawson, while *sole*, or since her marriage, done any act tending to convert into personalty the land, or her share in the land, here in dispute, which she inherited from her father, Benjamin Dawson. Nor will a court of equity favor a construction that directs the proceeds of the real estate of a married woman, under its control, away from its original source, but will prefer the blood relations, whose ancestor acquired the land, to a mere stranger who intermarries with an heir and begot no issue to inherit.

It was aptly remarked, in argument by counsel for the appellees, that from the earliest time, the common law, viewing with peculiar jealousy the alienation of land, threw around it certain incidents often highly artificial and burthensome, but the impress of which yet remains apparent in the body of our jurisprudence, * * *, &c. It took centuries to change the method of holding and parting with the freehold, even when the owner desired it, and that sanctity of the vested rights in land led the courts to give to its proceeds, when converted by the *vis superior*, the impress of realty. When the courts found it necessary to convert real estate into its representative, the law * * * * left it ultimately to the holder to designate how he would regard the proceeds; and when for any reason he was incapable of taking possession and converting the proceeds as he chose, they were held by the court subject to all the rights and incidents of realty." That this was done ever since the statute gave the right to courts of equity to make partition by sale seems clear.

From a very early period courts of equity in England had concurrent jurisdiction with courts of common law to make partition *in kind* of land. The power of compelling partition

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by sale, when partition in kind was impracticable, came by statute at a much later period. And we find, as a rule, that when the sale was made, and the person entitled was under disabilities, courts of equity gave the impress of realty to the proceeds *before any statute* requiring them to do was passed. Thus, independent of any statute, the right was asserted in equity to hold the proceeds of land sold for partition, with all the privileges and burthens incident to real estate, until some act of a party *sui juris* made the conversion. This is fully discussed and illustrated in *Forman v. Marsh*, 11 N. Y. 544, and *Horton v. McCoy*, 47 N. Y. 21.

Such is the inherent power of courts of equity; and a long line of English authorities might be cited to the effect that where land has been sold, not by voluntary negotiation, but by the compulsory proceedings authorized by statute, and the money paid into court, it continues to be real estate until it is taken out by some person having the right to elect to treat it as money, that is, by some person *sui juris*, who is the unfettered owner.

It only remains to take a very brief view of our own legislation upon the subject. It will be found that our legislature has yielded gradually and with evident reluctance to compulsory partition by sale. By section 20, chapter 96, of 1st Rev. Code, a sale was permitted only in case of two or more heirs, any one of whom should be an infant, *feme covert*, *non compos*, or beyond sea, and then only when the interest of each heir should not exceed in value \$300. This indicated very clearly that the legislative policy was opposed to the grant of power to the courts to compel partition by sale, except when the shares were very small, thus guarding the principle before referred to, that land shall move with the *blood* of him in whose right it was acquired.

Necessity brought about the provision contained in section 2, chapter 124, Code 1849, authorising a court of equity to make sale of land for partition, where partition in kind could not be

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conveniently made, or where the interests of the parties would be promoted by a sale. Had the act stopped here, there might have been a doubt as to how the proceeds of such compulsory sale should be distributed; and had it been the purpose of the legislature that the proceeds of such sale should be treated as personalty, nothing would have been easier or more natural than to say so. But the legislature did not say so. On the contrary, it provided in the same section that the court should distribute the proceeds of sale "according to the respective rights of those entitled." It could not have been intended, as insisted by appellant's counsel, that the words quoted mean nothing more than that the *proceeds* should be paid over to the parties entitled in the proportion to which they would have been entitled. If such was the meaning, the language employed was entirely useless, for the obvious reason that no court could in any case undertake to distribute a fund upon any other basis than as the parties were entitled. The language employed had quite another meaning; it meant that the court was called upon to make partition of land in that—the only way in which partition was practicable; that the rights of the parties were to have their respective interests in land turned over to them in that way; it might be for life as in case of a widow, in fee as in case of an heir *sui juris*, yet in the same right as if the land had been actually delivered to each party entitled, with the benefit and burthens incident thereto.

But, it is insisted on behalf of the appellant, that section 12 of chapter 128 of the Code of 1849, should be read in connection with said section 2 of chapter 124, to sustain the inference attempted to be drawn from the two sections there read, that, inasmuch as "married women" are not mentioned in said section 12 of chapter 128, therefore the proceeds of the sale of their lands are not stamped with the impress of realty. We are clearly of opinion that this contention is not well founded.

Said section 12 of chapter 128 is in reference to the lands of infants and insane persons, as well as to lands sold under chap-

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ter 124; and provides that whatever is received for the sale of the lands of infants or insane persons, under that chapter [128] or under chapter 124, for the real estate of an infant or insane person, or so much thereof as remains at his death, intestate, shall, if he continue till his death incapable of making a will, pass to those who would have been entitled to the land if it had not been so sold or divided.

Now the reason why the proceeds of the sale of the lands of married women were not included in § 12 of ch. 128, is obvious. By § 2 of ch. 124, the proceeds were required to be distributed according to the *rights* of the parties. It must be supposed that in framing § 2 of ch. 124, the legislature had in mind the state of the law as long settled in courts of equity in respect to the estates of married women under the control of a court of equity. For centuries courts of equity had exercised the inherent right to attach to the property of a married woman, under their control, the wife's equity, and to guard the proceeds of her maiden land whenever it became necessary to invoke the aid of equity, by either settling it upon her, or refusing the control of it to her husband until he gave security or made a settlement himself upon her. 2 Story's Eq. Jur. § 1408, *et seq.* What was the rule then is the rule now. Freeman on Co-tenancy and Partition, § 549. Sale for the purpose of partition was authorized by statute to be enforced by courts of equity, and for that reason it was not necessary to provide by statute what it was the peculiar province of equity to do independent of statute, in respect to the estates of married women. This view is borne out by legislative action subsequent to 1849. In 1866, § 12 of ch. 128 was amended by inserting the words "or a married woman," and at the same time so amended § 2 of ch. 124, the partition law, as to provide that when the share of a married woman should exceed \$300, security should be taken to protect her interest. Subsequently (see Acts 1869-70, p. 578), the partition law was again amended and re-enacted, by dropping out the words, "or mar-

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ried woman." Clearly, for the reason already given, these words were stricken out of the partition law, simply because they were useless. On the contrary, the reason for inserting the provision in § 12 of ch. 128, as to the sale of the lands of infants and insane persons, rested on entirely different grounds. Their lands would pass into the hands of guardians and committees, who might infer that they had the right to sell and convert real estate into personalty. Out of abundant caution the legislature guarded against the exercise of any such power by the provision in § 12 of ch. 128. It is difficult to conceive any other plausible reason for so doing.

It is useless to pursue the subject further. Agnes C. Dawson, with the other heirs of Benjamin Dawson, one of whom was an infant, inherited land. She never, while she was *sole*, or after her marriage with the appellant, did any act tending to a conversion of the fund in question into personalty. She bore no child to the appellant, and died leaving her husband a stranger in blood and interest to the fund in controversy, stamped as it is with the character of real estate, and belongs by law and reason to the next of kin, to the exclusion of her surviving husband, the appellant.

For these reasons the decree of the court below must be affirmed, with costs to the appellees.

DECREE AFFIRMED.

Stannton.

YOST v. PORTER & ALS.

OCTOBER 8TH, 1885.

1. CHANCERY PRACTICE—*Parties—Rule.*—All persons beneficially interested in object of suit must in general be made parties, so that all questions arising may be fully and finally settled.
2. IDEM—*Sale for purchase money—Terms.*—Sale for purchase money will not be decreed where the property remains encumbered for purchase money due from plaintiff, without providing for discharge of such encumbrance. Terms of sale are within court's discretion, and no complaint against them will be heard without evidence that the price would have been better had the terms been more liberal.
3. IDEM—*Upset-bid.*—Where after sale, fairly made for adequate price, has been confirmed, an upset bid is offered, and the sale is set aside upon condition that said bid be made good by a certain time, when the re-sale should take place upon terms which would not extend the deferred payments beyond the time at which the bonds taken at the previous sale were to become due, and no complaint of said terms was made below, and no proof offered that upset-bidder could have complied with his bid had the terms been more liberal, there is no ground on this account for complaint in the appellate court. *Langyher v. Patterson and als.* 77 Va. 470.
4. IDEM—*Interlocutory decrees—Costs.*—No complaint can be made even by the party substantially prevailing, against non-allowance of costs upon an interlocutory decree, as upon final decree the question of costs can be properly adjusted.
5. IDEM—*Suspension of decree—Judge's delay.*—Where, in such case of upset bid and conditional setting aside of sale and suspension of decree of sale to a certain period in order to give upset-bidder opportunity to comply with the conditions of re-sale, he applies to the judge in vacation for an extension of such suspension in order to give time to apply

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for appeal and *supersedeas*, and the judge delays acting on such application till after the period within which compliance was permissible, such action of the judge could not be corrected by the appellate court.

Argued at Wytheville, but decided at Staunton.

Appeal from seven interlocutory decrees of circuit court of Wythe county rendered from March term, 1883, to April term, 1885, inclusive, in the cause of D. H. Porter *against* W. R. B. Horne, W. L. Yost and others.

Opinion states the case.

F. S. Blair, for the appellant.

D. S. Pierce and *J. W. Caldwell*, for the appellees.

LEWIS, P., delivered the opinion of the court.

The petition for appeal is voluminous, assigning no less than twenty-eight errors in the decrees complained of, for which, "and for other errors to be assigned at bar," it is insisted that those decrees should be reversed. To notice these assignments, severally and in detail, would swell this opinion to no small proportions; nor is it necessary to do so. They have all been considered, and none of them are well taken. Only those upon which stress is chiefly laid will be noticed specially. Before, however, doing so, it may be well to advert to the pleadings, and other proceedings in the cause, and to the object for which the suit was instituted.

The bill was filed by the appellee, Porter, to subject to the satisfaction of a bond for one thousand dollars, then past due, which had been assigned to him by one W. R. B. Horne, for valuable consideration, a certain house and lot in the town of Wytheville. This bond was executed by the appellant, Yost, to Horne, as part consideration of the purchase of the said house and lot, and was secured by a lien thereon. It seems

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that the lot had been conveyed by Horne to Yost, and a lien for the purchase money retained on the face of the conveyance, and that a like lien had been retained in the deed to Horne from his vendor, Percival.

At the time of the assignment of the bond to the plaintiff, there was an unascertained balance due by Horne to Percival on account of the purchase of the property, and upon this ground payment of the bond was refused by Yost, when payment was demanded by the plaintiff, who thereupon instituted the present suit. And to the bill he made not only Yost, but Percival and Horne, parties defendant, to the end that the rights of all the parties might be adjusted under decrees of the court, and the property sold to satisfy the bond which had been assigned to him.

Separate answers were filed by the defendants, and Yost also demurred. The answer of Percival was treated as a cross-bill, to which the defendant, Horne, duly filed his answer. The answer of Yost referred at some length to the transactions between the parties, and concluded as follows: "Respondent is advised that a court of equity will not determine the matter in this cause without a reference for a full account of all matters between the parties thereto, to the end of a final settlement of same, and asks for said account." Accordingly, a decree was entered, referring the cause to a commissioner for proper accounts to be taken, who at once proceeded to execute the decree, and duly returned his report to the court. To this report there was no exception by the defendant, Yost, and the rights of the other parties appear to have been settled by the commissioner's report, and subsequent decrees, to their mutual satisfaction.

In due time a sale of the house and lot was decreed, which was afterwards made and reported by commissioners appointed for the purpose, the price bid being \$2800, which was the precise sum for which the property had been purchased by Yost of Horne. The report of sale, however, was excepted to

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by Yost on various grounds, and the court refused to confirm the same, and directed the commissioners, after due advertisement, to offer the property for sale again. The second effort resulted like the first, namely, in obtaining a bid for the sum of \$2800. The sale was duly reported to the court, and Yost again excepted; but the exceptions were overruled and the sale confirmed. At a subsequent day of the same term, however, a decree was entered, permitting one H. Simmerman to make good an upset bid of ten per cent. of the purchase price within thirty days thereafter, upon certain prescribed conditions, and providing, that in the event the same was done, the property should be again offered for sale; otherwise, the previous decree of confirmation to stand.

After the adjournment of the term, a written application for the suspension of the execution of the decree requiring possession of the property to be delivered to W. O. Moore, the purchaser, was mailed by Yost to the judge of the circuit court, then holding a term of his court in the county of Carroll, which, for reasons endorsed on the application was refused. And thereupon the present appeal was allowed by one of the judges of this court.

The first error assigned in the petition, is the action of the circuit court in overruling the demurrer to the plaintiff's bill. No grounds, however, for this assignment are set forth in the petition, and a careful scrutiny of the bill fails to disclose that any exist. It was undoubtedly the right of the plaintiff to bring before the court all the parties having an interest in the property, that their respective rights might be definitely ascertained and settled, and the way thus cleared for the enforcement of the lien to satisfy the bond held by him. And such would seem to have been the desire of the appellant himself at the time his answer was filed, since, as we have seen, he expressly asked for an account, in order that a final settlement of all matters between the parties might be made under decrees of the court.

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"It is the constant aim of courts of equity," says Judge Story, "to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also, that future litigation may be prevented. Hence, the common expression that courts of equity delight to do justice, and not by halves. And hence, also, it is a general rule in equity (subject to certain exceptions), that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all." Story's Eq. Pl. sec. 72. See also *Armentrout v. Gibbons*, 25 Gratt. 371; *Dabney v. Preston*, Id. 838; *Fitzgibbon v. Barry*, 78 Va. 755.

Nor is there anything in the record to show that the decree of sale was not properly made. It is not disputed that the appellant had paid but a small part of the purchase money he had contracted to pay, and that the whole of the balance was past due when the decree was entered. What right, then, has he to complain because he has thus been required to comply with his own voluntary obligations after the way for him to safely do so has been cleared by the court? One of the grounds upon which his complaint is based is, that the plaintiff can occupy no better position than his assignor, Horne, who, at the time the suit was instituted, was in no position to compel payment of the bond, because by his covenant he had bound himself to make to the appellant a deed in fee simple, with general warranty, within ninety days after the purchase of the property; and that although the deed had been made, yet there were incumbrances on the property, and until the same were removed, payment of the bond assigned could not be required. It is sufficient, however, to say, in answer to this objection, that the deed with general warranty from Horne and wife was accepted by the appellant with knowledge of the existence of the

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prior lien for unpaid purchase money in favor of Percival, and that after the accounts between Horne and Percival had been settled, and provision had been made for the payment out of the proceeds of sale of the balance due by Horne to Percival, which by the decree was directed to be credited on the amount due by the appellant to Horne, there was no longer any semblance of reason for the refusal of payment by the appellant of the bond held by the plaintiff, since he was thereby enabled to pay the same without incurring any risk of loss whatever.

But it is further insisted, that the decree operates oppressively and unjustly, because the sale decreed was not on a reasonable credit. By the terms of the decree, the commissioners were required to sell the property at public auction, to the highest bidder, "for one-fourth cash in hand, the residue to be divided into four equal interest-bearing instalments, due respectively in three, six, nine and twelve months from day of sale," the purchaser to give bond with good security, etc. Upon these terms the sale was made, and there is no evidence in the record to show that the price obtained was inadequate, or that the property would probably have commanded a better price if the sale had been made on more liberal terms.

But the appellant's principal objection relates to the decree in respect to the upset bid which was offered in the case. That bid was offered after the sale had been confirmed, and the decree provides as follows: "That if the said Henry Simmerman shall, within thirty days from this date, pay into the hands of commissioners Terry and Crockett, the sum of \$280, and the further sum of \$700, with interest from 10th November, 1884, and shall deposit with said commissioners his bond with security to be approved by them, and to secure the residue of the purchase money for which said house and lot was sold, on the 10th November, 1884, and to make good his upset bid, then said commissioners shall proceed to re-sell the said house and lot according to the terms of the former decree of sale in this cause, except that the deferred payments therein

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provided for shall be so made in the re-sale as not to extend said deferred payments beyond the period provided for in the said decree of sale heretofore entered in this cause."

Thus, by the terms of this decree, the credit allowed, in the event that the upset bidder made good his bid, and a re-sale was made, was not to extend beyond the time at which the bonds for the deferred payments taken at the sale which had been confirmed were to become due. And in consequence of these terms, which in the petition for appeal are characterized as harsh and unprecedented, it is alleged by the appellant that the party desiring to make good his upset bid was rendered unable to do so. Of this, however, there is not a particle of proof in the record, and *non constat* that he could have complied with any terms, however reasonable or liberal.

But apart from this, it is to be observed that the sale was decreed for the collection of purchase money long past due; purchase money for property, with which the vendor had parted, on the faith of the vendee's promise to pay within a certain time, and of which the latter had been in the possession and enjoyment long after he had made default. Moreover, the question as to the terms of sale is, as a general rule, and more especially in a case like this, a matter resting in the sound discretion of the court; and its action ought not therefore to be disturbed by an appellate court, unless the same is palpably wrong. And this cannot justly be said of the action of the court of which the appellant complains. Indeed, it cannot be said that its action in dealing with the appellant has not been marked by a spirit of liberality throughout. Thus, although the sale, which was fairly made and for an adequate consideration, had been confirmed, yet, in the supposed interest of the appellant, and without objection on the part of the purchaser, a re-sale was directed upon compliance with certain prescribed conditions. And of those conditions no complaint was made in the lower court, nor is any foundation shown for the complaint now made to this court.

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In *Langyher, trustee, v. Patterson and Bash*, 77 Va. 470, after the sale had been confirmed, the decree of confirmation was set aside and a re-sale ordered upon the offer of an advanced bid. Upon appeal by the purchaser to this court, the action of the circuit court was reversed. Judge Fauntleroy, in delivering the opinion of the court, after reviewing the authorities, said: "We think there was error . . . in setting aside the decree of confirmation . . . in this case . . . for, though it was within the discretion of the court, at any time during the term, to set aside the decree and rescind the sale upon proper motion and notice to the purchaser and parties concerned, and for good cause shown, such, for instance, as a sacrifice of the property, yet it was in this case, so far as the record shows, not a sound, but apparently an arbitrary discretion, which calls for appellate correction by this court."

Plainly, then, under the circumstances of the present case, there was no right on the part of the appellant, or any other person, to demand a re-sale of the property, upon the mere offer of an upset bid, after the sale had been confirmed. And if, nevertheless, with the assent of the purchaser, the privilege of a re-sale was accorded, it could be enjoyed only on the terms which the court in its discretion saw fit to impose. Those terms it was optional with the upset-bidder to accept or not as he chose, and certainly there is nothing in them for which the action of the circuit court should be reversed.

Complaint is also made that costs were not awarded the appellant in the lower court. He claims to be entitled to costs, because, as he insists, he was not in default, since he could not safely pay the purchase money due by him, except under a decree of the court. It is sufficient, however, to say that no provision in respect to costs has as yet been made at all, and that it will be time enough to do so when the cause is ready for final decree.

Another subject of much complaint is the refusal of the circuit judge, in vacation, to make an order at the instance of the

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appellant, to further suspend the execution of the decree requiring possession of the property to be delivered to the purchaser. The application was made under the provisions of sec. 4 of ch. 178 of the Code of 1873, which enacts that "at the instance of any person who desires to present such petition [for an appeal, or writ of error, or *supersedeas*], the court in which the judgment, decree or order is, may, during the term at which it is rendered or made, or the judge rendering such judgment, order or decree, may, within sixty days after such term is ended, make an order suspending the execution of such judgment, decree or order, for a reasonable time to be specified in such order, when such person shall give bond," etc.

It is complained that the judge unreasonably delayed action upon the application until it was too late to enable the appellant to obtain an appeal and *supersedeas* to stop the execution of the decree which he sought to have suspended. But this complaint is unsupported by the record; and it is difficult to see how, even if the action of the judge in that particular were open to criticism, it could now be corrected by this court. Nor is it necessary to enquire whether or not the course of the appellant himself has been influenced by a desire for unreasonable delay, since this is a matter not essential to the decision of the present case.

The remaining assignments of error are of even less importance than those to which we have referred. It is unnecessary to notice them, further than to say, as we have already said, that they are not well taken.

The decrees appealed from must therefore be affirmed.

DECREES AFFIRMED.

Staunton.

CLOWSER V. HALL.

OCTOBER 8TH, 1885.

ATTACHMENTS—Affidavits.—Every averment in an affidavit to support an attachment under Code 1873, ch. 148, sec. 1, must be stated *as a fact*, absolutely, and upon affiant's own knowledge, and not upon belief, or information and belief.

Error to judgment of circuit court of Frederick county.
Opinion states the case.

A. R. Pendleton, for plaintiff in error.

Holmes Conrad, for defendant in error.

FAUNTLEROY, J., delivered the opinion of the court.

This is a writ of error to an order of the circuit court of Frederick county, entered March 19th, 1874, abating and dismissing an attachment, sued out in said court by S. C. Clowser, plaintiff in an action of trespass on the case for breach of marriage contract, against J. W. C. Hall, the defendant in said suit, as a non-resident of the commonwealth of Virginia, under section 1, chapter 148, of the Code of 1873. The attachment was founded and issued upon the following affidavit, made and filed in the said suit:

“Personally appeared before me, J. B. Burgess, clerk of the

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circuit court of Frederick county, Virginia, A. R. Pendleton, attorney-in-fact for S. C. Clowser, who made oath that J. W. C. Hall is, *as he believes*, justly indebted to the said S. C. Clowser in the sum of five thousand dollars; that there is present cause of action therefor; that said J. W. C. Hall is not a resident of this State, and that affiant believes he has estate within said county of Frederick, Virginia."

The order complained of is as follows:

"It further appearing that the affidavit for the attachment issued because of non-residence, states affiant's *belief* in the existence of, and not his *knowledge* of, the facts stated in said affidavit, for that cause the said attachment is abated."

We do not think there is any error in this order. Section 1, chapter 148, of the Code of 1873, under which the attachment was issued, reads:

"When any suit is instituted for any debt, or for damages for breach of any contract, an affidavit stating the amount and justice of the claim, that there is present cause of action therefor, that the defendant, or one of the defendants, is not a resident of this State, and that the affiant believes he has estate or debts due him within the county or corporation in which the suit is, or that he is sued with a defendant residing therein, the plaintiff may forthwith sue out of the clerk's office an attachment against the estate of the non-resident defendant for the amount so stated."

By the very terms of this statute it is prescribed, that every averment must be stated *as a fact*, as to the amount and justice of the claim; and that there is present cause of action therefor; and that the defendant is a non-resident of the State: that these averments in the affidavit must be absolute, and upon affiant's own knowledge, and not upon information and belief, nor upon *belief*. *Vide* Daniel on Attachments, sec. 33; Barton's Law Practice, p. 304.

"All the elements of positiveness, knowledge, information, or belief, conjointly or separately, which the statute may re-

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quire in the making of an affidavit, should therein appear, or be substantially included in its terms; or it will be bad. Thus, if a statute requires a fact to be sworn to, in direct terms, it is not complied with by the party's swearing that he is 'informed and believes' the fact to exist." Drake on Attachment, sect. 106, 4th edition.

The judgment or order of the circuit court of Frederick, complained of, is correct, and must be affirmed, and this appeal be dismissed.

JUDGMENT AFFIRMED.

Staunton.

GURNEE v. BAUSEMER & Co.

OCTOBER 8TH, 1885.

PRINCIPAL AND SURETY—Release—Counsel fees—Case at bar.—B. & Co. held judgments against M., binding on land of his surety, W., aliened to G. In suit of *Bank v. M.*, funds were recovered to pay M.'s debts. A decree was entered requiring those participating in said funds to pay 25 per cent. of their claims for fees allowed plaintiff's counsel. B & Co. participated, received the amounts of their judgments less said 25 per cent., and receipted in full. Later, B. & Co. claimed that their judgments were subsisting liens on W.'s land aliened to G., who was no party to the suit, to the extent of said 25 per cent.; and court below directed receiver to collect said 25 per cent. of G. On appeal:

HELD:

1. Release of the principal M. was the release of his surety, W.; and the judgment liens were discharged *in toto*.
2. Creditors have no legal right to be re-imbursed by their debtors for counsel fees contracted by them.
- 3 G. being no party to the suit, the decree was a nullity *quoad* him. *Cronise v. Carper*, ante p. 678.

Appeal from decree of circuit court of Rockbridge county entered March 18th, 1885, in certain causes entitled the National Bank of Richmond and als. *against* W.W. Major and als.; and George W. Johnson's executor *against* G. A. White and als.; and W. G. Bausemer, for etc. *against* G. A. White and als., which were heard and acted on together.

By the decree the receiver of the court was required to collect of Walter S. Gurnee, the appellant, the sum of \$619.04,

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with interest from December 15th, 1883, the amount assessed upon the judgments of Bausemer & Co. against Major & White, for the payment of their share of the fees of plaintiff's counsel in the first cause above named, and decreed to be re-imbursed to Bausemer & Co. out of certain land which had been aliened by White to Gurnee, subject to said judgments, but which judgments had been discharged with funds of Major, the principal debtor.

Opinion states the case.

Sheffey & Bungardner and *Edmund Pendleton*, for the appellant.

David E. Moore, for the appellees.

FAUNTLEROY, J., delivered the opinion of the court.

This is an appeal from a decree of the circuit court of Rockbridge county, rendered March 18th, 1885, in certain causes therein pending, entitled, "The National Exchange Bank of Richmond, &c., *against* W. W. Major and others;" "George W. Johnson's Ex'or *against* G. A. White and others;" and "W. G. Bausemer, for, &c., *against* G. A. White and others;" which said causes were heard and acted on together.

It appears from the record that W. G. Bausemer & Co. recovered sundry judgments in the courts of Rockbridge county, against W. W. Major and G. A. White, upon negotiable paper made by Major, as principal, to White, and passed, by the endorsement of White, to said Bausemer & Co.; which said judgments were duly docketed on the lien docket in said county court clerk's office, as provided by statute. Subsequent to the docketing of the said judgments, G. A. White executed to Walter S. Gurnee a trust lien on a large and valuable landed estate lying in Rockbridge county, known as "Hart's Bottom," to secure a large loan from Gurnee to White.

In the meantime a creditors bill was filed by the National

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Exchange Bank of Richmond, Va., *against* W. W. Major; and, under an order of reference in said suit, the aforesaid Bausemer & Co. judgments against Major and White were filed and reported as subsisting liens on the real estate of the said Major, and were confirmed as such by the decree of the court.

In the suit of the National Exchange Bank of Richmond, &c., *against* Major and others (which was a creditors suit), there was recovered for the creditors of W. W. Major the sum of \$15,028.30, as of October 1, 1881. To this suit Gurnee was not a party. After this recovery the court made an order directing that those entitled to the fund, and who should "derive benefit from the litigation," by participating in the fund recovered, should be assessed ratably, upon their claims or interests, 25 per centum, chargeable to those who should participate in the fund, to pay fees allowed to counsel conducting the litigation for complainants in the cause. Bausemer & Co. went forward and participated in the fund, and received the amount of their judgments, less 25 per cent., which they allowed to be deducted for counsel fees, and receipted for their judgments in full, thereby discharged their liens as against their principal judgment debtor, Major.

But the said Bausemer & Co. having so participated in this fund, and allowed the counsel fees, upon the terms of the decree, set up the pretension that Walter S. Gurnee, the purchaser of "Hart's Bottom" tract of land from G. A. White, who was surety for their judgment debtor, Major, should refund this 25 per centum of their judgment-liens which they had paid, or allowed to be deducted, as aforesaid; and accordingly the court made an order of reference to its master commissioner to ascertain and report whether the said Gurnee is responsible for any portion of the attorneys' fees so paid by Bausemer & Co., amounting to \$619.04. Responsive to this order of reference the master commissioner reported, as his opinion, "that the Bausemer & Co. judgments, to the extent of the 25 per centum which had been deducted therefrom to pay counsel fees in the

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suit against W. W. Major, are subsisting liens on the tract of land known as "Hart's Bottom," alienated by G. A. White to Walter S. Gurnee, subsequent to their rendition and docketing."

To this report Walter S. Gurnee excepted, "because it improperly charges him with the fees of counsel paid by Bausemer & Co., and declares the amount thereof to be a lien on Hart's Bottom." This exception was overruled by the circuit court, and the said report was confirmed; and it further ordered, "that the receiver of the court do collect from W. S. Gurnee the sum of \$619.04, with interest thereon from the 15th of December, 1883, and a sufficient sum to cover the costs of this reference." From this decree, rendered March 18th, 1885, this appeal is taken.

We are of opinion that the decree complained of is wholly erroneous.

The appellant, W. S. Gurnee, was the purchaser from G. A. White, for a valuable consideration, fully paid, of the "Hart's Bottom" tract of land. W. W. Major was the principal judgment debtor, and White only his surety, bound by the Bausemer & Co. judgment-liens. Bausemer & Co., without the knowledge or consent of Gurnee (who was neither a party nor privy to the suit), elected to take under the decree according to its terms and conditions, and so dealt with the principal, Major, in the judgment debts as to release and discharge the liens of the judgments which were paid off and satisfied by the fund constituted by the money of the said Major, the principal debtor; and they now invoke a court of equity to revive a dead lien against an innocent *alienee*, for *value*, of that *surety*, whose *principal* they had discharged, and to subject the land of that innocent purchaser to the operation of this dead lien, although the land was released absolutely and wholly from the lien of the judgment as soon as they participated in the money and discharged the principal debtor, W. W. Major.

Bausemer & Co.'s claims, evidenced by the judgments, were

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proved before the master and were paid off in full; and a large balance of the fund, arising from the property of W. W. Major, was left over to be distributed ratably amongst other unpaid creditors, after paying Bausemer & Co. the full amount of their unpaid claims. It was the same thing, in law, as if Bausemer & Co. had drawn out of the fund the full amount set apart by the decree to pay their judgment claims proven in the cause, and then, out of it, had paid their counsel fees. Gurnee, the appellant, was no party to the suit in which these counsel fees were allowed and ordered by the court, and he is not bound by the decree made therein.

The notes held by Bausemer & Co., on which they obtained their judgments, were the notes of W. W. Major, endorsed to them by White. Major was primarily bound; and White, as his surety, in equity, had the right to require Bausemer & Co. to exhaust the principal before coming on him, or on his innocent alienee, Gurnee. Neither White nor Gurnee was bound to furnish to Bausemer & Co. money to pay counsel for pursuing their remedy against Major, their debtor; and after allowing the money of their debtor, in the hands of the court, justly belonging to them, to go to pay these large counsel fees, they cannot be permitted to call on Gurnee to pay it back to them. Their remedy (if any they have) is against those who got their money, and not against an innocent party.

Creditors who collect their debts by law, even when successful, are losers to the extent of the amount paid to counsel; but the law will not countenance the demand that the losing defendant shall re-imburse their losses so incurred, and so, it may be, contracted by them.

The record shows that Bausemer & Co.'s claims were satisfied by and as to Major, the principal debtor; and they cannot be unsatisfied as to White, a mere surety, and his alienee, Gurnee, and the judgment liens are no longer binding on the tract of land known as "Hart's Bottom," purchased and paid for by Gurnee from G. A. White.

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Nothing could affect the land or the purchaser, Gurnee, but the judgments: they were paid and satisfied by Major, the principal debtor; and it does not implicate or concern his surety, White, or Gurnee, White's alienee, what Bausemer & Co. did, or allowed to be done, with the money.

As Gurnee, the appellee, is shown by the record to have no contract relations, expressed or implied, with Bausemer & Co., they, as volunteers, could not by their unauthorized acts, create a contract for him. No man can make himself the creditor of another by any act of his own—unsolicited and merely officious. 2 Greenleaf on Evidence, § 107; *Eastwood v. Kenyon*, 11 Ad. & Ellis, 438; *Parker v. Carter*, 4 Munford, 273; *Cook v. Bradley*, 7 Conn. 57; *Mills v. Wyman*, 3 Pick. 207; *Stokes v. Lewis*, 1 T. R. 20.

The decree of the circuit court of Rockbridge county, complained of, is erroneous, and must be reversed with costs.

DECREE REVERSED.

Staunton.

PAXTON v. STUART & ALS.

OCTOBER 8TH, 1885.

1. EQUITY JURISDICTION AND RELIEF—*Resulting trusts—Liens—Set-offs—Case at bar.*—From ancestor's estate there were shares going to I., to J., to P. and to P.'s ward. I. and P. jointly purchased land, and used all the shares in paying for it. Then, I. sold to P. her half of the land, and for part of the price took three bonds of P., with J. as surety, payable to I.'s husband, who assigned them for value to S. T. and B. In a creditor's suit to ascertain debts and liens against P.'s estate—

HELD:

1. P.'s ward has a paramount lien on the entire land to the extent his share was used in paying for it.
 2. J. has an equal lien with P.'s ward, on the entire land to the extent his share was used in paying for it, *unless* the transaction between P. and J. as to this use of J.'s share, made P. individually the debtor therefor to J., and destroyed his lien.
 3. But if such lien remains in favor of J., he is entitled to set off the amount thereof *pro tanto*, against the bonds of P. and himself to I.'s husband, in whose hands soever they may be found.
2. PRACTICE IN CHANCERY—*Lunatic defendant.*—Pending a suit against a lunatic represented by his committee, the lunatic dies, the committee *ipso facto* becomes *functus officio* and the suit abates, and must be revived and proceed in the name of the lunatic's personal representative and heirs; and all proceedings had after lunatic's death and before such revival, are void.

Appeal from decree of the circuit court of Botetourt county, rendered October 29th, 1884, in a chancery cause wherein J. T. Paxton is complainant, and Wm. Stuart, J. W. Stuart, C.

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B. Thomas, A. J. Stalnaker and Isabella, his wife, J. H. H. Figgat and als. are defendants.

Opinion states the case.

B. Haden, for the appellant.

F. T. Glasgow, for the appellees.

RICHARDSON, J., delivered the opinion of the court.

James Paxton died testate, and his will was admitted to probate in the county of Botetourt in 1866. His executors, on the 15th of November, 1866, sold one tract, "Five Forks," of the testator's real estate for \$22,025, and the other tract, "Soldiers' Retreat," for \$13,000. The purchasers of the last named tract were his son, P. M. Paxton, and his daughter, Isabella M. Paxton, afterwards Mrs. Stalnaker, who executed eighteen bonds for the purchase money, and received a conveyance, reserving a lien on the land to secure the purchase money represented by said bonds. They also purchased of the executors, personal property to the amount of \$1691.47; and in this way they, on the 15th day of November, 1868, owed on these two accounts, to said executors, the sum of \$16,378.33, of which \$1712 was for the personalty.

It appears from a decree of the circuit court of Botetourt county, entered on the 28th day of October, 1868, in the suit of James Paxton's executor *against* James Paxton's heirs and others, that the share of Isabella M. Paxton in her father's estate amounted to \$5418.92; the share of P. M. Paxton to \$6008.34; the share of J. T. Paxton, the appellant, to \$1938.05; and the share of J. Wm. Gilmore, a grandson and legatee of the testator, to \$2966.86; which sums had been decreed to them respectively, as of the 15th day of November, 1868, in the said suit of Paxton's executor *against* Paxton's heirs and others; and by the decree in which the executor, Glasgow,

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was authorized to assign and transfer to the legatees named, purchase-money bonds of Isabella and P. M. Paxton for the amounts, respectively, of their several legacies. The bonds were accordingly transferred, that is, by delivering to Isabella and P. M. Paxton, respectively, their bonds to the amount of their interests; and to J. T. Paxton, bonds of Isabella and P. M. Paxton, for the amount of said J. T. Paxton's interest; and by assigning to P. M. Paxton, guardian of J. Wm. Gilmore, bonds of said Isabella and P. M. Paxton, to the amount of said Gilmore's interest; and receipts were accordingly taken by Glasgow, executor; and thus the entire indebtedness of Isabella and P. M. Paxton, on account of the purchase money for "Soldiers' Retreat," and for the personalty bought by them, was paid and discharged as to said executor. J. Wm. Gilmore got satisfaction of his interest, as will hereinafter be shown. But, although the entire indebtedness to Glasgow, executor of James Paxton, was discharged as above stated, it does not appear by the record how, if in any way, the legacy of J. T. Paxton has been paid. It is, however, a fact, appearing by the record, that subsequently, and very soon after said settlement of November 15th, 1868, J. T. Paxton became the holder and owner of two bonds executed by P. M. Paxton to him, which together amount to said share of J. T. Paxton, *less the small sum of five cents*. What was the consideration of these bonds is not disclosed by the record. They bear date November 23d, 1868, only eight days after said settlement of November 15th, 1868. On these bonds of P. M. Paxton, J. T. Paxton recovered judgment, no resistance thereto being made by P. M. Paxton. Nor does the record show that at any time after the execution of these bonds by P. M. Paxton to him, was J. T. Paxton in possession of any of the bonds of Isabella and P. M. Paxton, transferred to him for the amount of his said legacy.

Subsequently, by their deed, dated January 21st, 1869, the said Isabella, who had intermarried with Albert G. Stalnaker, and her said husband, sold and conveyed to P. M. Paxton, her

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undivided moiety of "Soldiers' Retreat," for the sum of \$7500, payable as follows, to-wit: to W. A. Glasgow, surviving executor of James Paxton, \$2770.24, which in the deed was declared to be the balance due from Stalnaker and wife on the joint purchase made by her before marriage, and P. M. Paxton from said executors, together with their interest therein, and the residue, to-wit: \$4729.76, to said A. G. Stalnaker, that is, \$1000 on or before the 1st day of January, 1869, and the balance in four equal payments of \$932.44 each, payable respectively in one, two, three and four years, from the 1st day of January, 1869, with interest from that date, payable annually. It appears that the contract of sale was made in the fall of 1868. A lien is retained in the deed to secure the payment of the several sums of money therein specified. The balance thus made to appear to be due to Glasgow, executor, was evidently fixed by deducting from Mrs. Stalnaker's half of the indebtedness, to-wit: \$8189.16, her share of the estate, \$5418.92, which left exactly the \$2770.24. It is obvious that this sum could not have been due said Glasgow, as executor, the entire indebtedness of Isabella and P. M. Paxton, in their joint purchase from the executors having been discharged as aforesaid by the transfer by Glasgow, surviving executor, of the bonds of Isabella and P. M. Paxton, for which a lien was reserved by the executors in the deed to them.

For the four deferred payments four bonds were executed by P. M. Paxton and J. T. Paxton, payable to A. G. Stalnaker. On three of these bonds judgments were afterwards obtained: on numbers two and three for the benefit of the appellees, Stuart and Thomas, and on number three for the benefit of W. J. Betterton, all of whom were assignees for value.

At February rules, 1873, Stuart and Thomas brought, in the circuit court of Botetourt county, a creditor's suit against P. M. Paxton and others. This cause was regularly matured and set for hearing. By proceedings therein the liens on the lands of P. M. Paxton were ascertained by report of a commissioner,

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which report was confirmed; the report showing that the rents for five years would be insufficient to discharge said liens, interests and costs; and on the 15th day of May, 1873, a decree was entered directing a special commissioner to sell the lands of P. M. Paxton, to satisfy said liens. Before the sale was made, to-wit, in the year 1875, it appears that P. M. Paxton became deranged in mind.

At June rules, 1876, J. T. Paxton filed an original creditor's bill against P. M. Paxton's committee and others, in which he recites the proceedings just mentioned as having taken place in said suit of Stuart and Thomas; refers to the said bonds of P. M. Paxton and himself to Stalnaker, and to the judgments thereon, as being in large part unpaid, and as being valid liens on P. M. Paxton's land, and as being paramount to any other claims against said land, being for the purchase money thereof; sets up the fact that his brother, P. M. Paxton, had become a lunatic, and gives as a reason for filing his bill, that, in addition to the debts which were liens on the lands of P. M. Paxton, there were outstanding debts against him, and that he desired them all to be ascertained and settled. He also alleged, that in order to make a valid sale of P. M. Paxton's land, it was necessary that all the persons, who would be the heirs at law of P. M. Paxton, if he were dead, should be parties to the suit, and all such were made parties, as well as W. P. Burks, Jr., the committee of P. M. Paxton, and prayed that the two causes be consolidated, and the lands sold, if necessary to the settlement of P. M. Paxton's debts.

This cause was also regularly matured as to all the adult defendants, and a guardian *ad litem* assigned to the infant defendant, and his answer filed. On motion of J. T. Paxton the two causes were consolidated, and were again referred to a commissioner to ascertain and report the debts of P. M. Paxton, and their priorities, if any.

On the 25th day of October, 1876, J. Wm. Gilmore, who had attained his majority, filed his petition asserting his legacy

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against the estate of his guardian, P. M. Paxton, and claiming priority of lien on "Soldiers' Retreat," over the debts of said P. M. Paxton, on the ground that neither the executor, Glasgow, nor the guardian, P. M. Paxton, had the power or the right to invalidate the claim of the petitioner upon the proceeds of the sale of his grandfather's real estate for the amount of his legacy, and the interest thereon, or to merge his legacy with the purchase of said land by P. M. and Isabella Paxton, so as to enable P. M. Paxton to use a fund held by him as guardian, to pay a debt due by him individually to the executor.

A report of liens was returned by the commissioner, and the report was confirmed without exceptions, on the 24th of April, 1877, and a sale of P. M. Paxton's land was decreed to satisfy the liens thereon. By the decree of that date, the report of the commissioner was in all respects confirmed, except as to the claim of J. Wm. Gilmore, as to which the decree held the same valid for the sum of \$3521.16, as of May 1st, 1877, and secured by the vendor's lien retained by James Paxton's executors in their deed to P. M. and Isabella Paxton, which lien had not been destroyed, and that that claim, and the claim for \$118.22 found by the report in favor of John J. Paxton, receiver, for the benefit of J. G. Mackey, of John L. Taylor, receiver, etc., Starkey Robinson, guardian, etc., and of C. M. Reynolds, receiver, etc., respectively, are *the first liens* on the said land, and to be paid out of the proceeds of the sale thereof, ratably.

The judgments on the bonds assigned to Stuart and Thomas and to Betterton were declared to be the second liens thereon, to be paid ratably: and the land was decreed to be sold. The special commissioners appointed to make the sale, reported that they had sold to J. Wm. Gilmore about 217 acres of "Soldiers' Retreat," at \$18 per acre; to J. T. Paxton 229½ acres, at \$9 per acre; and to J. T. Paxton 21 acres, at \$1 per acre.

Gilmore, after deducting the amount of his legacy, paid the balance of his purchase, which was but a small amount. J. T.

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Paxton paid for the 21 acres purchased by him, and the titles were decreed to the purchasers respectively. But J. T. Paxton never complied with the terms of the sale of the portion of "Soldiers' Retreat" purchased by him. He did not make the cash payment, nor did he execute the required bonds for the deferred payments. A rule was issued against him on the 31st of October, 1881, to show cause why said land should not be re-sold at his risk. On the 31st of May, 1882, J. T. Paxton filed his answer to the rule, wherein he states several matters wholly irrelevant and not responsive to the rule, but among other things he says that so much of the bonds of Isabella and P. M. Paxton, which were executed to the executors of James Paxton for the purchase money of "Soldiers' Retreat," and delivered up to satisfy the shares of P. M. and Isabella Paxton, J. T. Paxton and J. Wm. Gilmore, as equal his share, to wit: \$1938.05 and interest, was still due and unpaid to him, and was a first lien on said tract of land, and that he had done nothing to impair that lien, and that he was entitled to set-off the amount thereof *pro tanto*, against the judgments on the bonds of P. M. Paxton and himself, whether the same were in the hands of the obligee, Stalnaker, or his assignees.

A decree was rendered May 31, 1882, referring the cause to a commissioner to enquire, among other things, what amount of money was coming to J. T. Paxton from the estate of his father, James Paxton, and what part thereof had been paid, and by whom and how paid, and what liens exist on "Soldiers' Retreat," and also what payments, if any, J. T. Paxton had made on the 229½ acres, part of "Soldiers' Retreat."

In his report of May 29th, 1883, the commissioner stated, that the amount decreed to be coming to J. T. Paxton from his father's estate was \$2079.78, and that the executor, Glasgow, held his receipt in full therefor; that P. M. and Isabella Paxton had paid for "Soldiers' Retreat," as before stated in this opinion; and that he was advised of no other liens on said tract than those already reported. Depositions were taken and

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filed in the cause May 29th, 1883, but are mostly on matters outside of the points on which the decision of this case must turn,—except that it appears therefrom that P. M. Paxton was dead at the time the decree of the 24th of April, 1877, for the sale of his land, was entered. The fact that he was then dead is mentioned in J. T. Paxton's answer to the rule which was filed in May, 1882. Yet, strange to say, the fact of his death is not referred to in any decree in this cause, and no amended bill was filed or step taken to bring his personal representative and heirs before the court, his estate being represented only by his committee, who by law became *functus officio* by the death of the lunatic.

On the 27th day of October, 1883, the circuit court again referred the cause to a master, to state an account showing the amount Isabella Stalnaker had paid on the purchase of "Soldiers' Retreat." with other matters pertinent. The master's report was filed May 23, 1884. It shows only what has already been set forth, to wit: that she conveyed her half, \$8189.16, of the indebtedness of herself and P. M. Paxton to James Paxton's estate by receiving her share thereof, \$5418.92, and securing the balance, \$2770.24, by lien in favor of Glasgow, executor, on her moiety of "Soldiers' Retreat," reserved in the deed of herself and husband to P. M. Paxton; and that P. M. Paxton arranged his half of said indebtedness with the shares of himself, J. T. Paxton, and J. Wm. Gilmore, and by paying the balance of \$106.15. As pertinent to the enquiry the master states, "that as P. M. Paxton took satisfaction of J. Wm. Gilmore's legacy by the transfer of his own and his sister's bonds, he took the same as a subsisting lien on the land, which the court has heretofore enforced by its decree; and that the same lien existed as to J. T. Paxton, if he took assignment or transfer of bonds on P. M. and Isabella Paxton. But if J. T. Paxton merely negotiated a loan to them of his share of his father's estate, that transaction changes the nature of his claim." J. T. Paxton excepted to this report. By its decree

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of October 29th, 1884, which is the decree appealed from, the circuit court overruled the exceptions and confirmed the report, and adjudged that, it appearing to the court that J. T. Paxton had a lien upon the lands of P. M. Paxton for the amount of his legacy from James Paxton, deceased, yet he can not claim the same as against Isabella Stalnaker or her assigns on the bonds for the sale of her half of said land, sold by her to P. M. Paxton, for which J. T. Paxton became the surety; and it further appearing to the court that the said suits were properly heard together, and that J. T. Paxton was a party thereto, and that by his petition he has had all his rights adjudicated, it is therefore adjudged, ordered and decreed, that "certain special commissioners sell the tract of 229½ acres of land heretofore sold to J. T. Paxton," &c.

We are clearly of opinion that the decree appealed from, and all the decrees entered in these causes since the death of P. M. Paxton, are erroneous and must be reversed, because at the time they were entered P. M. Paxton's estate was not properly represented before the court.

We are also of opinion, that so far as the decree of April 24th, 1877, adjudges that J. Wm. Gilmore had a first lien on "Soldiers' Retreat," to the amount of his legacy and interest, \$3521.16, that decree is right, but that the same is erroneous in so far as it adjudges the claims which were reported in favor of John J. Paxton for J. G. Mackey, of John L. Taylor, receiver, of Starkie Robinson, guardian, &c., and of C. M. Reynolds, receiver, &c., to be also first liens on "Soldiers' Retreat." James Paxton's executors sold that tract for \$13,000, to P. M. and Isabella Paxton, and retained a lien for the purchase money. The surviving executor, Glasgow, accepted their shares of the testator's estate, and the shares of J. T. Paxton and J. Wm. Gilmore, and the \$106.16, in satisfaction of the lien, and in effect released it. But in this transaction the interest of J. Wm. Gilmore, the ward of P. M. Paxton, was used by the

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guardian in extinguishing his individual liability; and it is plain that the lien in favor of Gilmore, the ward of P. M. Paxton, was not thereby released, but remained in favor of said ward for his share so used. And unless, by transactions between P. M. Paxton and J. T. Paxton, the lien which the latter originally had on "Soldiers' Retreat" for his share, was extinguished, and took the form of a mere debt of P. M. Paxton to J. T. Paxton, and was represented by the two bonds of P. M. to J. T. Paxton, aggregating \$1938, or some other form, it is equally clear that J. T. Paxton is also still entitled to a first lien on that land, equally and ratably with the lien of J. Wm. Gilmore. That decree, however, does not recognize any such lien in favor of J. T. Paxton. If the circuit court considered that that lien had not been extinguished, it erred in not including it with J. Wm. Gilmore's lien as jointly constituting the first liens on said land. But if the circuit court considered that J. T. Paxton's lien had been extinguished, then this court is of opinion that the circuit court erred in so considering, because the record is not sufficiently clear on that question of fact, and the circuit court should have definitely ascertained the truth in that respect before entering its decree.

It is true, that in its decree of October 29th, 1884, the circuit court seems to recognize that such lien still subsists in favor of J. T. Paxton. The language, however, is in the past tense, and is consistent with the idea that J. T. Paxton had released the lien which he originally had on said land.

If the circuit court actually meant to decide that though J. T. Paxton still had a claim for the amount of his share in his father's estate, on the land for half of which the bonds of P. M. Paxton and himself had been executed to Stalnaker, yet that J. T. Paxton could not set off the amount of his said lien against said bonds in whose hands soever they might be, then in that respect the decree appealed from is erroneous. It is true, that by the way in which the master states the mode in

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which the purchase money was paid for "Soldiers' Retreat," it appears that it was not Mrs. Stalnaker who used J. T. Paxton's share to pay that purchase money, but that it was P. M. Paxton who so used it; yet he used it to take up the joint bonds of himself and of Isabella Paxton, which bonds were liens on the land. Therefore she, as well as P. M. Paxton, was bound to J. T. Paxton for the amount so used, and he has a lien on the whole tract as well as a claim on her and him for the said amount, *unless* J. T. Paxton released his lien, and changed the form of his claim for the amount of his said share into a mere personal claim on P. M. Paxton, and as to this, there is need of further enquiry before the rights of the parties can be properly adjudicated.

Therefore, the decree appealed from must be reversed and annulled, and the cause remanded to the circuit court with instructions to so amend the pleadings as to bring before the court the personal representative and heirs at law of P. M. Paxton, deceased, and to take steps to ascertain either by reference to a master, or by an issue out of chancery, whether or not J. T. Paxton assigned, or in any way parted with his said share of his father's estate to P. M. Paxton, so as to extinguish his lien on "Soldiers' Retreat" and convert it into a mere personal claim against P. M. Paxton. And if the circuit court shall ascertain that J. T. Paxton did not so extinguish his lien, then it shall allow the amount of the said lien to go as a set-off against the judgments on the said bonds of P. M. and J. T. Paxton.

And it appearing that J. T. Paxton placed in the hands of J. H. H. Figgat, who was attorney for the assignees of the said bonds, certain claims on Bell, Echols and Catlet, the proceeds whereof were to be applied to the said bonds, the circuit court is directed to ascertain what amount thereof has been realized and is applicable to the said bonds, and to cause the same to be applied thereto.

For these reasons the said decree is reversed, with costs to

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the appellant, and the cause is remanded to said circuit court for further proceedings therein, in accordance with the views set forth in this opinion.

DECREE REVERSED.

INDEX.

ACCEPTANCE. (*See Negotiable Instruments.*)

ACCESSORIES. (*See Criminal Jurisdiction and Proceedings*, 7, 8.)

ADEPTION. (*See Legacies.*)

ADMINISTRATORS. (*See Fiduciaries.*)

ADVANCEMENT. (*See Legacies.*)

AFFIDAVIT.

Attachments.—Every averment in an affidavit to support an attachment under Code 1873, ch 148, sec. 1, must be stated *as a fact*, absolutely, and upon affiant's own knowledge, and not upon belief, or information and belief. *Clowser v. Hall*, 864.

AGENT.

1. *Unconstitutional—Inter-state commerce—Book agents.*—Sections 39 and 40, of chapter 1, of the revenue laws of Virginia (Acts 1883-'4, p. 582), are unconstitutional, because discriminating in favor of publishers of books, &c., in this State, and against such publishers in other States, thus contravening clause 3, section 8, article 1, of the Federal constitution, which gives Congress the right to regulate commerce between the several States. *Ex parte, Rollins*, 314.
2. *Insurance company—Contract—Agent to solicit.*—An agent whose powers are limited by the charter, constitution or by-laws of the company, to receiving and forwarding applications for insurance, together with the premiums, to the company for acceptance or rejection, can make no contract of insurance binding the company. *Haden v. Farmers and Mechanics Fire Association*, 683.
3. *Idem—Agents—Powers.*—Insurance company may empower its agents to make contracts of insurance, or may limit their authority to soliciting applications, which are to be forwarded to its board of directors, who alone may be authorized by its constitution and by-laws to make such contracts. *Idem*.

AGREEMENT. (*See Contracts*, 8, 9, 10.)

ALTERATION OF INSTRUMENTS. *Batchelder v. White*, 103.

ANSWER. (*See Practice in Chancery*, 12, 13, 14.)

APPEALS.

Appellate court—First appeal—Second appeal.—It is the well settled rule of this court, that a question which has been decided upon the first appeal in any cause, cannot be reviewed or reversed upon any subsequent appeal in the same cause. *Stuart & Palmer v. Preston*, 625. (*See Appellate court.*)

APPELLATE COURT.

1. *Reversible error*—P., a creditor of the Commonwealth, filed in the circuit court of the city of Richmond, under Code of 1873, chapter 44, his petition against the Commonwealth and the Auditor of Public Accounts, praying judgment against her for the amount of his debt, and a rule was awarded summoning them to answer the petition. Later, before appearance for either of them, the court, *ex mero motu*, dismissed the petition against the Commonwealth. On error to this court:

HELD:

1. Under statute, the Commonwealth of Virginia may be sued for any debt or claim due
 2. But, though the order dismissing the petition against the Commonwealth, may have been unnecessary, yet as it did not affect the petitioner's right or remedy, it was not an error for which this court will reverse the order. *Parsons' case*, 163.
 2. *Jurisdiction—Unconstitutional.*—Act of March 12th, 1884, is unconstitutional so far as it confers upon this court jurisdiction in all cases of coupons arising under act of January, 14th, 1882, without regard to the amount in controversy, being in conflict with Article VI of State Constitution fixing minimum jurisdictional amount in cases purely pecuniary at \$500. *McIntosh v. Braden*, 217.
 3. *Appellate jurisdiction—Dissolution of injunctions.*—From an order overruling an injunction and adjudicating the principles of the cause, an appeal lies. *Kahn v. Kerngood*, 242.
- Idem—Matter in controversy.*—Where a deed conveys property alleged therein to be worth over \$500, and is assailed as fraudulent by a creditor whose debt is less than \$500 as between the grantee and the assailing creditor, the matter in controversy is the value of the property, and not the amount of the debt; and in the absence of proof to the contrary, the alleged must be deemed the actual value of the property. *Idem*.
4. *Dismissal of appeals.*—Order dismissing appeal or writ of error, effects same purpose as affirmance. Code 1873, chap. 178, sect. 18. *Cobbs v. Gilchrist*, 503.
 5. *Record—Certificate.*—Nothing, not made part of the record by bill of exceptions, or by order of the court, can be regarded as such by the

APPELLATE COURT (*continued*).

- appellate court. The clerk can add nothing to the record, and his certificate that a deposition or other paper copied by him, was the evidence whereon the judgment was founded, is no part of the record. *Roanoke Land and Improvement Co. v. Karn & Hickson*, 589.
6. *Pleadings—Demurrer—Jeofails.*—Judgment will not be reversed for defect, imperfection, or omission in the pleadings, unless in court below there was a demurrer. Code 1873, ch. 177, § 3. But a failure to state any cause of action at all, is not cured by the statute. *Idem*.
 7. *First appeal—Second appeal.*—It is the well settled rule of this court, that a question which has been decided upon the first appeal in any cause, cannot be reviewed or reversed upon any subsequent appeal in the same cause. *Stuart & Palmer v. Preston*, 625.
 8. *Appeals—Jurisdiction—Plaintiff appellant—Defendant appellant.*—If plaintiff's claim exceed \$500, and he apply for appeal, this court hath jurisdiction, though the judgment or decree be for less. But if the judgment or decree be for less than \$500, principal and interest, at the date of the decree, and the defendant apply for appeal, this court hath not jurisdiction. *Duffey & Bolton v. Figgat*, 664.
 9. *Idem—Special commissioners—Defalcation.*—Where purchasers at judicial sale are compelled to pay a second time a part of purchase money, by means of the special commissioner's failure to give required bond, and his default in paying over money collected of them, the jurisdiction of this court to hear their appeal, depends on the amount of the defalcation, and not on the amount of his official bond. *Idem*.
 10. *Commissioners' reports.*—It is well settled by repeated decisions of this court, that commissioners' reports, not excepted to, cannot be impeached before an appellate court in relation to matters which may be affected by extraneous testimony. *Ashby v. Bell's adm'or*, 811.
 11. *Objections there—Reviewed.* *Shen. V. R. R. Co. v. Miller*, 821.

ARGUMENT.

1. *Evidence—Cumulative.*—After the argument has commenced it is too late to admit mere cumulative evidence. *Barbour's case*, 287.
2. *Idem—Counsel—Prisoner's statement.*—Much latitude is allowed counsel in argument, but they should not relate to the jury the prisoner's version as *the statement of the accused*, where the latter could not himself testify. *Idem*.

ASSIGNMENT.

1. *Recordation—Case at bar.*—Assignments of choses in action need not in Virginia be recorded. The case here is one of competitive assignments. *Daily's ex'or v. Warren*, 512.

ASSIGNMENT (*continued*).

2. *Competitive assignees—Burden of proof.*—Where subsequent assignee claims that he took his assignment for value, without notice of the previous assignment, and that the previous assignment was fraudulent, the burden is, of course, on him to prove the case. *Idem*.
3. *Equitable assignments—Drawee's liability—Payee's remedy.*—It is well settled, that where one man having funds in another's hands, draws on him an order directing them to be paid to a third party, for value, such order will pass to the payee the title to said funds, which title a court of equity will enforce. But drawee may refuse to accept; in which event he is not liable *at law* to payee; but payee may then return order to drawer; or may sue drawer; or may sue in equity for the fund. *S. V. R. R. Co. v. Miller*, 821.
4. *Notice of—Effect—Subsequent promise.* *Stebbins & Lawson v. Bruce*, 389.

ASSIGNOR AND ASSIGNEE.

1. *Equities.*—It is settled law in this State that assignee of non-negotiable paper stands in the shoes of his assignor, and takes subject to all defences of debtor against assignor existing before notice of assignment. *Stebbins & Lawson v. Bruce*, 389.
2. *Estoppel—Silence.*—Where, after notice of assignment, debtor expressly or impliedly promises to pay the debt, he is estopped from setting up any defence he had against assignor. Mere silence will not operate such estoppel. *Idem*.
3. *Notice—Effect.*—Legal effect of notice of assignment is not to make debtor disclose his defences, but to preclude him from setting up defences after acquired against assignor. *Idem*.
4. *Subsequent promise—Conflict of evidence.*—Where by letter assignee notifies debtor of assignment, and letter answers that assignor was heavily indebted to him, and that he ought to have credit therefor, and it does not appear that assignee was induced to alter his position by the answer, and the testimony is conflicting, and the jury finds for the debtor, the verdict will not be disturbed. *Idem*.
5. *Practice in chancery—Assignors parties.*—Where one files petition in pending cause to assert claim as assignee to debt reported therein, the assignor must be made party to petition and summoned to answer. *Daily's ex'or v. Warren*, 512.
6. *Idem—Review and reversal—Witness.*—Decree directing payment of such debt to such petitioning assignee, will be reversed on petition of the assignor, who has not been made party and summoned to answer. And on hearing of such petition to re-hear, the assignor and a rival assignee are competent witnesses to prove the assignment to the latter and the consideration thereof. *Idem*.

ASSIGNOR AND ASSIGNEE (*continued*).

7. *Evidence—Subsequent declarations.*—Declarations made and letters written by assignor subsequent to assignment, are inadmissible as evidence against his assignee. *Idem*.
8. *Evidence—Post admission of assignors.* (*See Evidence* 4.)

ASSUMPSIT, ACTION OF. (*See Practice at Common Law*, 7.)

ATTACHMENTS.

1. *Foreign attachment—Bill demurrable—When.*—Neither under section 2, chapter 175, nor under section 11, chapter 148, Code 1873, can "a suit, in the nature of a foreign attachment," be maintained unless the claim asserted be actually due. Unless the bill avers that a debt is due the plaintiff from one who is non-resident of this State, and who has estate and effects in this State, it is demurrable. *Batchelder v. White*, 103.
2. *Affidavits.*—Every averment in an affidavit to support an attachment under Code 1873, ch. 148, sect. 1, must be stated *as a fact*, absolutely, and upon affiant's own knowledge, and not upon belief, or information and belief. *Clowser v. Hall*, 864.

ATTORNEY.

Attorney and client—License—Influencing legislation—Argument—Contracts, express and implied—Fees. *See Contracts*, 14, 15, 16.

ATTORNEY-GENERAL. (*See Officers*, 4, 5, 6, 7.)

BANKRUPTCY.

1. *Discharge in bankruptcy—Estoppel.*—A discharge in bankruptcy releases the warrantor from liability for covenants broken, but does not affect the estoppel, because the covenant runs with the land. *Gregory v. Peoples*, 355.
2. *Actions by or against assignee.*—U. S. Revised Statutes, section 5057, limiting actions by or against assignees to two years after accrual of rights, applies to all litigation between him and any adverse claimant. *Cobbs v. Gilchrist*, 503.

BASTARD.

1. *Marriage of colored persons—Legitimacy of children.*—Under act approved 27 February, 1866, to legalize marriage of colored persons living together as husband and wife at the time of its passage, children of such persons are deemed legitimate whether born before or after the passage of said act, and whether any sort of marriage ceremony had taken place between the parents or not. *Smith v. Perry*, 563.
2. *Idem—Bastardy.*—In such cases, the question of bastardy must be

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BANKRUPTCY (*continued*).

considered as in any case where bastardy is alleged as to a child born during coverture, or born before and recognized afterwards. *Idem*.

3. *Legitimacy—Presumption*.—This law presumes legitimacy where husband recognizes the child as his, and impossibility of procreation is not established, though the cohabitation had ceased before the passage of this act. *Idem*.
4. *Bastards in Virginia*.—They are persons born out of wedlock, lawful or unlawful, or not within competent time after termination of coverture, or if born out of wedlock, whose parents do not afterwards intermarry and the father acknowledges them, or who are born in wedlock when procreation by the husband is impossible. *Idem*.
5. *Construction of statutes—Bastards—Legitimation*.—Code 1873, chap. 119, §§ 6 and 7, providing that "if a man having had offspring by a woman shall afterwards intermarry with her, such offspring, if recognized by him before or after the marriage, shall be deemed legitimate," and that "the issue of marriages deemed null in law, or dissolved by a court, shall, nevertheless, be legitimate," does not apply to and legitimate the offspring of a cohabitation in this state between a white person and a negro, when the parents subsequently have celebrated between them a ceremony of marriage, outside of this state, in some place where marriage between such persons is lawful. *Greenhow v. James' ex'or*, 636.

BEQUESTS FOR PUBLIC USES.

1. *Legislation—Constitution*.—Before 1790 S. J. bequeathed £600 to the vestry of D. parish, in P. W. county, to be put out on real security, and the interest applied to educate poor children of that county. By an act of the Legislature, in 1790, the powers and duties of the vestry were conferred on the overseers of the poor of said county, and they lent the amount of said bequest, then £885, to C. B., and secured same on land in F. county. By an act of the Legislature, in 1819, the powers and duties of said overseers were transferred to the school commissioners of said county, who received the annual interest on said loan until 1860. C. B. died in that year, and his heirs conveyed the land to W. and J. G., subject to said lien. The latter sold the land, in 1863, to S. and P., and an act was passed by the Legislature, at Richmond, on 29th September, 1863 (see Acts 1863-'64, page 42, entitled "an act for the relief of W. E. and J. B. Gaskins"), authorizing them to pay into the literary fund the amount of said lien, and, upon the receipt thereof by the Second Auditor, the Attorney-General was authorized to release said land from said lien. Accordingly the amount was paid in Confederate currency, and on 10th October, 1863, the deed of release was executed. The land was then conveyed to S. and P. By an act of the Legislature, in 1872, the county school

REQUESTS FOR PUBLIC USES (*continued*).

board of P. W. county, became the successors of the overseers of the poor of said county, and in 1881 brought their bill in chancery, in the circuit court of F county, to declare the said act of 29th of September, 1863, unconstitutional, and the payment to the Auditor void, and to annul the deed of release of 10th October, 1863, and to subject the land to the lien created by the deed of 20th November, 1790. The defendants demurred and answered. On hearing, the circuit court decreed in accordance with the prayer of the bill. On appeal here—

Held (by a majority of the court, LEWIS, P., and HINTON, J., dissenting):

1. The act of the Legislature passed 29th September, 1863, is constitutional and valid.
2. Funds dedicated to public uses are entirely within the scope of the legislative powers of the General Assembly, and acts of legislation changing the custody of such funds, and directing payment thereof to the new custodian, and the execution of a release to the debtor are valid, and binding on all affected thereby.
3. Such acts come within the scope of the act of the restored government passed 28th February, 1866, validating "certain acts, contracts, and proceedings during the late war." *Prince William School Board v. Stuart and Palmer*, 64.

BILLS IN CHANCERY. (*See title, Practice in Chancery*, 4, 5, 6.)

BILL OF PARTICULARS. (*See Practice at Common Law*, 4.)

BONDS.

Alteration of instrument.—A material alteration of a bond or note after its execution, when intentionally made by one having an interest in it, and without the consent of the party bound by it, invalidates the instrument as to such party.

Q. borrowed of W. \$1,000, upon his note, endorsed by S. Afterwards, without the consent or knowledge of S., but with the knowledge and consent of W., the note was altered by Q., and raised to \$1500, as security for an additional \$500, which thereupon W. lent Q.

Held:

The alteration invalidated the note entirely as to S. *Batchelder v. White*, 103.

Coupon bonds—Theft of. (*See Negotiable Instruments*, 2.)

BUILDING.

Support—Easement acquirable. (*See Easements*, 2, 3, 4. *Tunstall v. Christian*, 1.)

CAVEAT EMPTOR.

Laches—Case at bar is one which, tested by the recognized criteria, is

CAVEAT EMPTOR (*continued*).

not a case of such laches as should prevent a court of equity from affording relief to the plaintiff. But it is one in which the maxim, *caveat emptor*, is clearly applicable to the defendant as a purchaser at a judicial sale of land included in an unreleased, duly recorded trust deed. *Wissler v. Craig*, 22.

CASES COMPARED AND DISTINGUISHED.

1. *Scott v. The Commonwealth*, 77 Va. 344, distinguished from the case at bar. *Jones' case*, 18.
2. The case of the *Bank of Old Dominion v. McVeigh*, 20 Gratt. 457, reviewed and distinguished from the case at bar. *Prince William School Board v. Stuart & Palmer*, 64.
3. *Wills—Cases compared—Pollock v. Glassell*, 2 Gratt. 440, is distinguished from case at bar in that, though there the name of the witness was put to the paper, not as a witness, but for some other purpose, yet, the testatrix requested the witness to alter the paper, and the witness adopted her signature already there; whilst here, the witness signed as emanuensis, and was not requested to attest the paper. *Peake v. Jenkins*, 293.
4. *Cases reviewed.—Baptist Association v. Hart*, 4 Wheaton, 1, and *Gallego v. Attorney-General*, 3 Leigh, 450—disapproved. *Vidal v. Girard*, 2 Howard, 127—approved. *P. Episcopal E. Society v. Churchman's rep's*, 718.

CHARITABLE BEQUESTS.

1. *Charitable bequests—Case at bar.*—Testator, in 1880, bequeathed money to be invested by a fiduciary, giving ample security, in safe interest-bearing funds, the interest only to be applied to the use of his legatee during her life, and at her death, "the principal and any unexpended interest to be paid to the trustees of the Protestant Episcopal Education Society of Virginia" (incorporated in 1875), "said bequest to be used exclusively for educating poor young men for the Episcopal ministry, upon the basis of evangelical principles as now established."

HELD:

1. The bequest to the legatee corporation is not null and void, because not absolute for its own use as a corporate body, but *in trust* to be exclusively used for the trusts therein named, and because those trusts are religious in their character, and too vague and indefinite to be upheld under the law of this State, or to be administered by a court of chancery, even if merely educational as contemplated by Code 1873, chap. 77, sec. 2.
2. The bequest is not contrary to public policy, but is valid both at common law and under Code 1873, chap. 77, and is enforceable by the chancery courts of this State.

CHARITABLE BEQUESTS (*continued*).

2. *Corporations—Trustees*.—Corporations may take and hold estates for the use of another, if not for purposes foreign to the objects of their creation; and a devise or bequest to a corporation in trust, if otherwise valid, is not for that reason void. *P. Episcopal E. Society v. Churchman's rep's*, 718.
3. *Trusts—Express—Implied*.—Where, in the nature of things, a trust is created, it is immaterial that it is not expressly declared in terms. *Idem*.
4. *Charities—Definition*.—In a legal sense, a charity is a gift to be applied, consistently with the laws, for the purpose of benefiting an indefinite number of persons in any respect whatever, and it is not material that the purpose should be expressly designated as charitable. *Idem*.
5. *Religious uses—Public policy*.—As exhibited by the legislation of this State, there has never been any hostility here to bequests for religious uses. See Code 1873, chapters 75 and 77. *Idem*.
6. *Idem—Idem*.—This court has never decided that bequests for religious uses were void, for that reason alone. *Idem*.
7. *Equitable jurisdiction and relief—Charitable uses—Common law—43 Elizabeth—Act of 1839*.—At common law chancery courts had jurisdiction to enforce bequests for charitable uses. Statute of 43 Elizabeth did not confer such jurisdiction, but only created an auxiliary remedy by commission, &c. Said statute was local, and never in force here. But if it was general in its operation in some respects, it was not repealed by the Act of 1792, but in those respects was preserved by the saving clause of that act. In any event, the Act of 1839, (Code 1873, chap. 77,) clearly validates and makes enforceable all gifts for such purposes, subject to certain restrictions therein contained. *Idem*.
8. *Cases reviewed*.—*Baptist Association v. Hart*, 4 Wheaton 1, and *Gallego v. Attorney-General*, 3 Leigh, 450—disapproved. *Vidal v. Girard*, 2 Howard, 127—approved. *Idem*.

CHARTER AND BY-LAWS. *Notice*, (*See Corporations*.)

CHILDREN.

Marriage of colored persons—Legitimacy of children—Bastardy—Presumption of legitimacy of—Who are bastards in Virginia. *Smith v. Perry*, 563,

CODICIL. (*See Will.*)COMMISSIONERS' REPORT. (*See Practice in Chancery*, 10, 20, 27.)COMPROMISE. (*See Contracts*, 8, 9, 10.)

CONSTRUCTION OF STATUTES.

1. *Exemption from jury duty*.—Where, under section 16 of the act approved March 17th, 1884, to provide for the government of Virginia volunteers, Acts 1883-'84, page 615, a roll of a volunteer military company is filed with the clerk of the court, the members thereof are exempt from summons for jury duty, and, if summoned, need not attend to make their excuses. *Miller's case*, 33.
2. *Removal of causes—Constitution*.—Acts of March 7th, 1884, Acts 1883-'84, page 424, directing that on motion, on twenty days' notice by any party, any suit or proceeding pending in a corporation court shall be removed, as of right, to the circuit court of said corporation, is not unconstitutional. *Town of Danville v. Blackwell*, 38.
3. *Legislation—Constitution—Bequests for public uses*.—Before 1790 S. J. bequeathed £600 to the vestry of D. parish, in P. W. county, to be put out on real security, and the interest applied to educate poor children of that county. By an act of the Legislature, in 1790, the powers and duties of the vestry were conferred on the overseers of the poor of said county, and they lent the amount of said bequest, then, £885, to C. B., and secured same on land in F. county. By an act of the Legislature, in 1819 the powers and duties of said overseers were transferred to the school commissioners of said county, who received the annual interest on said loan until 1860. C. B. died in that year, and his heirs conveyed the land to W. and J. G., subject to said lien. The latter sold the land, in 1863, to S. and P., and an act was passed by the Legislature, at Richmond, on 29th September, 1863 (see Acts 1863-'64, page 42, entitled "an act for the relief of W. E. and J. B. Gaskins"), authorizing them to pay into the literary fund the amount of said lien, and, upon the receipt thereof by the Second Auditor, the Attorney-General was authorized to release said land from said lien. Accordingly the amount was paid in Confederate currency, and on 10th October, 1863, the deed of release was executed. The land was then conveyed to S. and P. By an act of the Legislature, in 1872, the county school board of P. W. county became the successors of the overseers of the poor of said county, and in 1881 brought their bill in chancery, in the circuit court of F. county, to declare the said act of 29th of September, 1863, unconstitutional, and the payment to the Auditor void, and to annul the deed of release of 10th October, 1863, and to subject the land to the lien created by the deed of 20th November, 1790. The defendants demurred and answered. On hearing, the circuit court decreed in accordance with the prayer of the bill. On appeal here—

Held (by a majority of the court, LEWIS, P., and HINTON, J., dissenting):

1. The act of the Legislature passed 29th September, 1863, is constitutional and valid.

CONSTRUCTION OF STATUTES (*continued*).

2. Funds dedicated to public uses are entirely within the scope of the legislative powers of the General Assembly, and acts of legislation changing the custody of such funds, and directing payment thereof to the new custodian, and the execution of a release to the debtor are valid, and binding on all affected thereby.
3. Such acts come within the scope of the act of the restored government passed 28th February, 1866, validating "certain acts, contracts, and proceedings during the late war." *Prince William School Board v. Stuart & Palmer*. 64.
4. *Rule of ejusdem generis*.—When a particular class of persons or things is spoken of in a statute, and general words follow, the class first mentioned must be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class, the effect of general words when they follow particular words being thus restricted. *City of Lynchburg v. N. & W. R. R. Co.* 237.
5. *Unconstitutional—Inter-state commerce*.—Sections 39 and 40, of chapter 1, of the revenue laws of Virginia (Acts 1883-'84, p. 582), are unconstitutional, because discriminating in favor of publishers of books, &c., in this state, and against such publishers in other states, thus contravening clause 3, section 8, article 1, of the Federal constitution, which gives Congress the right to regulate commerce between the several states. *Ex parte Rollins*, 314.
6. Unless a statute by its language, expressly or by necessary implication, demands such construction, it will not be construed as repealing a previous statute, or as being retrospective. *Ryan's case*, 385.
7. *Constitution—Public free school system*.—Hall's Free School, incorporated by act of assembly passed February 6th, 1846, is no part of the uniform system of public free schools contemplated by the constitution; and, therefore, the act of assembly approved December 1st, 1884, (Acts Extra Session, 1884, page 173) providing that the superintendent of public schools in the county of Hanover should pay over in each and every year, commencing with 1884, out of the school quota for Beaver Dam district, in the said county, to the trustees of Hall's Free School, a sum equal to the salary paid to any teacher of a school in said district having a like attendance of scholars, to be by them applied to the support of said Hall's Free School, is unconstitutional and void. *Hall's Free School Trustees v. Horne*, 470.
8. *Constitutional officers—Withholding salaries*.—The act of assembly passed November 24th, 1884 Acts (extra session) 1884, page 90, requiring the auditor to withhold the salary of any officer who is indebted to the state for money collected by him, or improperly drawn by him during his term of office, until the default is made good, is unconstitutional and void, so far as it affects constitutional officers. *Attorney-General v. Marye, Auditor*, 485.

CONSTRUCTION OF STATUTES (*continued*)

9. *Mechanic's liens*.—The remedy by lien under Code 1873, chapter 115, sections 2, 3 and 4, is a creature of statute unknown to the common law; and in order to entitle a contractor to its benefit, he must strictly pursue the statute. *Shackleford v. Beck*, 573.
10. *Account of work and material—Definition*.—The statute requires that a contractor seeking to secure the benefit of its provisions, shall file in the clerk's office an account (which is an itemized or detailed statement of the transactions to which it relates) of work done and materials furnished; and, therefore, a paper in the following words, *viz.*: "To balance of account rendered for work and labor done and material furnished for your house," is not sufficient to create the lien provided by the statute. *Idem*.
11. *Bastards—Legitimation*.—Code 1873, chap. 119, §§ 6 and 7, providing that "if a man having had offspring by a woman shall afterwards intermarry with her, such offspring, if recognized by him before or after the marriage, shall be deemed legitimate," and that "the issue of marriages deemed null in law, or dissolved by a court, shall, nevertheless, be legitimate," does not apply to and legitimate the offspring of a cohabitation in this state between a white person and a negro, when the parents subsequently have celebrated between them a ceremony of marriage, outside of this state, in some place where marriage between such persons is lawful. *Greenhow v. James' ex'or*, 636.

CONTRACTS.

1. *Improvement of property—Implied contract—Breach—Remedy*.—Where one undertakes to improve his own land, he impliedly contracts to use due care and skill, and to answer to the adjacent landowner for the consequences of his want of such skill and care. Where there is a breach of this implied contract, the party injured may waive the tort and maintain an action as for a breach of assumpsit. *Salamone v. Keiley*, 86.
2. *Perfected contract*.—Under acts approved 6th March, 1882 (Acts '81-'82, pages 246-249), authorizing the directors of the Central Lunatic Asylum to contract for the erection of suitable buildings for the accommodation of the colored insane of this State, no written and signed contract was required; and upon the acceptance by the board of the contractor's bonds, and the spreading upon the minutes of the articles of agreement between the parties, a contract was consummated, for any breach whereof the party aggrieved was entitled to recover damages. And if the bonds taken from the contractor were of the required penalty and conditions, and with sufficient security, it was immaterial whether they were executed by the contractor or by others. *Central Lunatic Asylum v. Flanagan*, 110.

CONTRACTS (*continued*).

3. *Construction—Interest*.—Contract of sale, dated August 26th, 1873, says the bonds for the purchase-money are "to bear interest from this date." The trust-deed describes the bonds as "dated September 10th, 1873, with six per cent. interest from August 26th, 1873." The bonds say, "with six per cent. interest from date above," when there is no "date above," except the date of the maturity of the bond. Receiver collected the bonds with interest only from their maturity.

HELD:

The bonds bear interest from the date of the contract, August 26th, 1873, till paid. *Wure v. Starkey*, 191.

4. *Specific performance—Parol contracts*.—B. by parol contract sells W. an acre of woodland for \$30, to be paid in three years, in work, and puts him in possession. W. clears the land and builds on it a dwelling, which with his family he continues to occupy, and in work paid B. the purchase-money.

HELD:

W. is entitled to a conveyance in specific performance of the sale of the land. *Bowman v. Wolford*, 213.

5. *Legislative acts—Repealable*.—Act of February 9th, 1882, empowering supervisors of Stafford county to build a bridge across Rappahannock river, and commissioners appointed by the county judge to manage it after its erection, is simply a grant by the State of certain privileges for public purposes, and contains none of the elements of a contract. *Supervisors of Stafford County v. Luck*, 223.

6. Therefore the act of March 18th, 1884, virtually repealing that act, does not impair the obligation of any contract with those supervisors, or with those commissioners, or assail any vested rights, and is not unconstitutional and void. *Idem*.

7. *Construction—Case at bar*.—H. by written contract, sells T. & Bro. certain growing timber, and allows them four years to cut it down. Afterwards, she endorses on the contract these words: "I agree to extend the time for cutting timber as fixed in this contract each year T. & Bro. rent and operate the G. steam mills, said extension to cover a period of five years from the expiration of this within contract, this extension of time being based on said T. & Bro. renting and operating said G. steam mills." Before the expiration of the four years, said mills burned down and were never rebuilt, and had never since then been rented and operated by T. & Bro.

HELD:

1. The extension was to begin after the expiration of the four years, and the condition upon which the extension was to begin, never was fulfilled. *Hughes v. Tinsley & Bro.* 259.

8. *Nudum pactum—Part for whole*.—An unsealed agreement to accept a

CONTRACTS (*continued*).

smaller sum than the entire debt, does not bind the creditor. *Pinnel's case*, 5 Coke's R. 117 a. But this technical rule is now in disfavor. *Seymour v. Goodrich*, 303.

9. *Compromise—New elements*.—Where a new element enters into the agreement to take a part for the whole, the entire debt is satisfied; *e. g.* a promise to pay at an earlier day, or at a different place, or in another thing than that stipulated for it in the original agreement, or a promise by a new party to pay. *Idem*.
10. *Idem—Case at bar*.—M. S. and others of the firm of A. C. & Co., owed \$2,000 to G.; W. agreed to pay, and paid G. \$400, on G's promise to release M. and S. from the debt.

HELD:

The agreement was binding on G., and M. and S. were released. *Idem*.

11. *Principal and surety—Change of contract*.—Surety is discharged by any change of contract, however immaterial, if made without surety's consent. *Christian & Gunn v. Keen*, 369.
12. *Descriptio personæ—Case at bar*.—In body of contract, M. is described as "Secretary of the M. E. Association," but he signs it in his own name without addition, and all the words of promise in the contract are his.

HELD:

It is the personal undertaking of M. and not the contract of the association. *Matthews v. Jenkins*, 463.

13. *Year's service—Monthly salary*.—A contract to continue for the period of a year, with salary payable monthly, does not make it incumbent on the employee to aver and prove that he performed the entire year's service, or was prevented from performing it by the employer, as a condition precedent to the former's recovering anything. If the whole is to be done on one side, before anything is done on the other, then the promises are dependent. But if something is to be done on the one side, before the whole is to be done on the other, then the promises are independent. *Idem*.
14. *Attorney and client—Fees—Taxed—By contract*.—The clerk of the court cannot tax against the losing party in a suit, other than the fees prescribed by statute. But contracts, express or implied, between attorney and client for fees, are not limited as to amount, and may be enforced as other contracts. *Yates & Ayres v. Robertson & Berkeley*, 475.
15. *Idem—License*.—A client cannot refuse to pay his attorney his fees, though that attorney be practicing without license. *Idem*.
16. *Idem—Influencing legislation—Bribing—Argument*.—Section 6, chap. 5, Criminal Code of 1878, p. 295, aims at the offence of paying money

CONTRACTS (*continued*).

or other compensation to secure the passage or defeat of any measure, and was doubtless intended to apply to the use of money in buying votes, &c.; and not to contracts with attorneys for purely professional services, such as drafting petitions, setting forth client's claim, taking testimony, collecting facts, preparing arguments, oral or written; addresses to the legislature or its committee, with the intention to reach its reason by argument. Hence contracts for the latter purpose are valid. *Idem*.

17. *Specific performance—Case at bar.*—In 1850 R. N. conveyed to S. lands in trust to secure debt to H. In 1874 a balance remained due, and trustee advertised sale. R. N., then old and feeble, asked his son, R. R. N., to pay the debt, and to take the land as his own, on condition of maintaining R. N. and wife during life. R. R. N. agreed, paid the debt, took possession of the land as his own, R. N. and wife making their home with and being maintained by him for seven years. But in 1881, R. N. conveyed the lands to G. H. N. and T. J. N. on the same conditions,—they having full notice of the contract of R. N. with R. R. N. The grantees in the last conveyance instituted suit, setting up the deed of 1881, and praying for a deed to them from the trustee. R. R. N. answered, and the latter filed his cross-bill, setting up his contract, its part performance, and his readiness and ability to perform the same on his part, and praying for cancellation of the deed of 1881, and for a conveyance from trustee to himself.

HELD :

By virtue of his contract, his payment of said balance, his possession and his part performance, R. R. N. has acquired an equitable title to the lands, which he has a right to have specifically enforced in equity. *Neel v. Neel*, 584.

18. *Specific performance—Requisites.*—The first requisite of a contract to entitle one to its specific performance in equity, is certainty and definiteness in its terms. *Litterall v. Jackson*, 601.
19. *Idem—Married women—Contracts—Lands.*—It is well settled that a court of equity will not decree against a wife performance of her contract to convey her lands; nor against wife or husband performance of his or their contract to convey her lands. *Idem*.
20. *Insurance—Specific performance—Bill.*—Equity will enforce performance of a contract of insurance made with an agent having authority to issue policies or to bind the company to issue policies, in favor of one who has paid the premium. But the bill must on its face distinctly state that such contract was made, and show when, where, how and by whom it was made, and that the person making it had authority to bind the company. *Haden v. Farmers and Mechanics Fire Association*, 683.

CONTRACTS (*continued*).

21. *Registry—Verbal sales of land*.—The statute in relation to the registry of contracts and deeds does not apply to verbal contracts for the sale and purchase of land. *Bowman v. Hicks*, 306.

CONTRIBUTION (*See Principal and Surety*).

CORPORATIONS.

1. *Municipal Corporations—Powers of Taxation*.—Every grant of the power of taxation to a municipal, or other subordinate body, must be strictly construed. And municipal officers must show, in the words of the charter, a warrant for whatsoever authority they assume to exercise. *City of Lynchburg v. N. & W. R. R. Co.*, 237.
2. *Idem—Idem*.—Section 5 of charter of city of Lynchburg, grants authority to impose a license tax upon persons engaged in certain enumerated callings, and "upon any other person or employment, which it may deem proper, whether such person or employment be herein specially enumerated or not," does not empower the city to impose such tax upon a railroad corporation; which is neither a person nor an employment, within the ordinary acceptation of those words. *Idem*.
3. *Eminent domain—Municipal corporations—Condemnation of land*.—Report of commissioners to condemn land for municipal purposes will not be quashed on the ground that a commissioner appointed, at the instance of the municipality, was interested, where the record does not show that the municipality was ignorant that he was interested when so appointed. Ignorance of the attorney making motion for the appointment, is not evidence of the municipality's ignorance that the commissioner was interested. But if commissioner was interested and disqualified, and municipality was ignorant, report will not be quashed, if record shows that the damages assessed are not excessive. *Roanoke City v. Berkowitz*, 616.
4. *Idem—Interest in land condemned*.—Corporations condemning land under Code 1873, chapter 56, section 11, must take and pay for the fee-simple, and not merely an easement, except it be a turnpike company. *Idem*.
5. *Constitution—Condemnation of fee-simple*.—This statute requiring the condemnation of the fee-simple is not repugnant to the constitution. And if it was, the municipality cannot be heard to deny the validity of the statute under which it has chosen to proceed. *Idem*.
6. *Municipal corporations—Damages—Ordinance*.—Ordinance to which land-owner refused assent, allowing him to build across the drain to be cut through land proposed to be condemned for the purpose, cannot be considered in assessing the damages. *Idem*.
7. *Insurance companies—Charter and by laws—Notice*.—Persons dealing

CORPORATIONS (*continued*).

with a corporation are affected with notice of the provisions of its charter, constitution and by-laws. *Haden v. Farmers and Merchants Fire Association*. 683.

8. *Trustees*.—Corporations may take and hold estates for the use of another, if not for purposes foreign to the objects of their creation; and a devise or bequest to a corporation in trust, if otherwise valid, is not for that reason void. *P. Episcopal E. Society v. Churchman's rep's*, 718.

COUNSEL'S FEES.

Creditors have no legal right to be reimbursed by their debtors for counsel fees contracted by them. *Gurnee v. Bausemer & Co.*, 867.

Yates & Ayres v. Berkeley & Harrison, 475.

COUNTY COURTS (*See Jurisdiction*, 2, 3, 8).

COUPONS.

1. *See Taxes*, 1, 2, 3.
2. *State—Suits against—Discrepancy fatal*.—Under act of 26th January, 1882, amended 13th March, 1884, Acts 1883-'84, page 527, the suit is required to be commenced by a petition filed at rules, upon which a summons shall be issued to the collecting officer, and regularly matured like any other action at law, and the coupons tendered shall be filed with the petition. A suit brought in any other way is unlawfully instituted, and must be dismissed. *Dunnington v. Ford*, 177.
3. *Coupon bonds—Theft of—Maker's liability*. *Branch v. Commissioner's Sinking Fund*, 427.

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. *Lascivious cohabitation*.—To sustain an indictment under sect 7, chap. 7, Criminal Procedure of 1878, page 302, the evidence must establish that the parties, not being married, lewdly and lasciviously associated and cohabited—that is, lived together in the same house as man and wife live together. *Jones' case*, 18.
2. *Venue*.—Indictment not sustained without proof that offence was committed in county wherein venue is laid; but a strong presumption thereof raised by the evidence suffices. *Richardson's case*, 124.
3. *Evidence*.—Evidence that the hands, knife, &c., of the prisoner were smeared with blood immediately after the homicide, is admissible, though there was no chemical analysis. *Barbour's case*, 287.
4. *Idem—Cumulative*.—After the argument has commenced, it is too late to admit mere cumulative evidence. *Idem*.
5. *Counsel—Prisoner's statement*.—Much latitude is allowed counsel in argument, but they should not relate to the jury the prisoner's ver-

CRIMINAL JURISDICTION AND PROCEEDINGS (*continued*).

- sion as *the statement of the accused*, where the latter could not himself testify. *Idem*.
6. *Case at bar*.—The facts exhibit a case of murder in the first degree. *Idem*.
 7. —*Aiding and abetting*.—It is well-settled law that mere presence is not sufficient to render one guilty of aiding and abetting the commission of crime. There must be something done or said by him showing his consent to the felonious purpose and contributing to its execution. *Kemp's case*, 443.
 8. *Case at bar*.—The circumstances indicate that though W. did kill the deceased, and that K was present, yet the latter did not aid or abet in the commission of the crime. *Idem*.
 9. *Felonious marriage—Indictment—Onus probandi*.—In order to sustain an indictment under section 8, chapter 7, Acts 1877-'78, making the intermarriage of a negro with a white person, a felony, it is necessary first to establish that the accused is a person with one-fourth, or more, of negro blood, *id est*, a negro; and the burden of proving this lies on the commonwealth. *Jones' case*, 538.
 10. *Jurors—Impaneling*.—The statutory provisions under sections 3 and 4, chapter 17 of Acts of Assembly 1877-78, are imperative and essential. The accused is entitled to demand strict compliance with them. Omission of such compliance is error. *Hall's case*, 555.
 11. *Jurors—Mode of selection—Venire facias*.—In a case where death may be the punishment, the writ shall require to be summoned twenty-four persons of the county or corporation, to be taken from a list to be furnished by the judge, residing remote from the place where the offence is charged to have been committed, and qualified in other respects to serve as jurors. From these shall be selected a panel of sixteen, free from exception, and from this panel the accused may strike four, and the remaining twelve shall constitute the jury. Acts 1877-78, page 340, section 4. *Idem*.
 12. *Second venire facias*.—In any felony case, where from those summoned and in attendance, a sufficient number of jurors cannot be had, a new *venire facias* must be directed, requiring to be summoned from the bystanders, or from a list to be furnished by the court, as many persons as may be deemed necessary. *Id.* section 4. *Idem*.
 13. *Omission of essentials—Error—Waiver—Motion in arrest of judgment*.—Omission to direct new *venire facias* or omission of any statutory essential apparent on the record, is error, and may be taken advantage of after verdict by motion in arrest of judgment, failure of accused to make the objection before jury sworn being no waiver. *Idem*.
 14. *House-breaking—Indictment—Ownership of house*.—An indictment

CRIMINAL JURISDICTION AND PROCEEDINGS (*continued*).

charging that "the prisoner, on, &c., a certain mill-house not adjoining to or occupied with the dwelling-house of F." &c., sufficiently alleges the ownership of the mill-house to be in F., and is sufficient in law. *Webster's case*, 598.

15. *Jurisdiction*—*How question of jurisdiction may be raised*. *Ryan's case*, 385.

DECLARATION (*See Practice at Common Law*, 8).**DECREES.**

1. *Who bound by*.—One not a party to the suit is not bound by any proceedings or decrees therein. *Strother v. Mitchell*, 149.
 2. *Judgments—Judgment creditors*.—By Code 1873, chapter 182, sections 1 and 2, a decree for specific property or requiring payment of money, has the effect of a judgment, and persons entitled thereto are judgment creditors. *Hulcheson v. Grubbs*, 251.
- See Judgments and Decrees.*

DEEDS.

1. *Construction of deeds—Case at bar*.—In 1865, H. conveyed in trust, to secure a debt to B., the west half of his land, whereon a debt to M. had already been secured. In 1876, H. conveyed the east half in trust, to secure, (1) the interest on a debt to D., and (2) the interest and principal of the other debts secured on any portion of said land, out of the rents, &c., thereof, during five years; and in trust that, if the debt to D. was not paid in that period, then the trustee should sell the property, and pay (1) the debt to D.; (2), anything remaining of the other debts therein provided for; and (3), the remainder to H. In 1880, H. contracted to marry S., and, in consideration of the marriage, conveyed to her the east half. The west half was sold under a decree of court, and its proceeds were consumed in paying the debt to M., leaving B. no other security than the trust on the east half; and the debt to D. being overdue and unpaid, B., in 1881, brought his suit to enforce said trust for his own benefit, subject to D.'s debt.

HELD:

B.'s debt is embraced in the deed of trust on the east half, subject to D.'s debt. *Hunter v. Beach*, 361.

2. *Dates—Acknowledgment—Presumption*.—If a deed hath a date, the law presumes it to have been delivered at that date, and this though it was acknowledged for registry at a subsequent time. But this presumption of law must yield to proof to the contrary. *Hardy v. Norfolk Manufacturing Co.*, 404.
3. *Trust-deeds—Omitted debts—Subsequent judgment*.—If a chartered company create a lien on its property for the purpose of giving preference to one or more creditors of the company over any other cred-

DEEDS (*continued*).

itor (except to secure a debt contracted at the time), such lien shall enure to the benefit ratably of all the creditors existing at the time of the creation of the lien. So, where a creditor under contract made before the creation of the lien, is omitted, and after that time obtains a judgment for unliquidated damages for breach of the contract, the lien enures for his benefit, ratably, with the other creditors. *Idem*.

4. *Trusts—Grants on condition—Liability of grantees—Sub-grantees with notice*.—Where land is conveyed to A. in consideration that he pay a certain debt, and A. does not execute the deed, but accepts it, and takes possession and holds the land, A. is personally liable for the debt, and the land in his hands is also liable. And if A. convey the land to B., who has notice of the consideration, B., too, is personally liable for the debt, and the land in his hands is also liable. *Hobson v. Willow*, 784.

5. *Construction of*. *Massie v. Heiskell*, 789.

DEMURRER.

Practice in chancery.—It is settled in this state that a demurrer in the form prescribed by the statute, and assigning no grounds, inserted in the answer is sufficient. And when the court has adjudicated the principles of the cause in favor of the plaintiff, the presumption is that it overruled the demurrer, though the record does not show what was done with it. *Matthews v. Jenkins*, 463.

See Practice in Chancery. See Practice at Common Law.

DEMURRER TO EVIDENCE.

It is well settled that by demurrer to the evidence, the demurrant admits the truth of all demurree's evidence, and all proper and reasonable inferences therefrom, and waives all his own evidence which is in conflict with, or tends to make a case different from the case of demurree's evidence. *Rudd's adm'r v. N. & W. R. R. Co.*, 546.

EASEMENTS.

1. *Land—Support—Source of right*.—The right to support for land in its natural condition, from subjacent and adjacent soil, is *ex jure naturæ*, not dependant on grant, and not acquirable by prescription. *Tunstall, trustee, v. Christian*, 1.
2. *Buildings—Support—Easement acquirable*.—The right to support for artificial burdens on land is an easement acquirable only by grant, express or implied; and neither this right nor the right to light and air can, in America, be acquired by prescription. *Secus* in England. *Idem*.
3. *Idem—Idem—Implied*.—The right to support for artificial burdens on land may be implied from circumstances, *e. g.*: where houses needing each the other's support are built by same owner, and one is granted

EASEMENTS (*continued*).

without stipulations to the contrary. But this implied right is confined to the *status quo* at time of grant, and extends not to increased burdens upon the soil.—*Idem*.

4. *Idem—Idem—Case at bar.*—L. owned two lots, with light wooden buildings, adjoining each other. By purchase B acquired one. By devise C acquired the other. The house on C's lot was burned. A similar one was built, and also burned, and was replaced by a three-story brick house, requiring a greatly-enlarged excavation. B afterwards removed his wooden house to rear an immense structure, requiring a deep excavation, and notified C to protect his property from injury by reason thereof. C obtained an injunction restraining B from excavating within *ten feet* of his foundation.

HELD:

1. C possesses no right, express or implied to support for his *building* from the soil of B.
2. B's failure to object to or his acquiescence in C's erecting his building, on his own land, does not *estop* B from denying C's right to support for that building from B's soil.
3. B. is bound to use reasonable care and skill in making his excavation and erecting his structure, and is answerable for all damage done C. by failing to use the same.
4. It would seem reasonable to require one about to endanger a neighbor's building by improving his own, to give that neighbor notice. *Idem*.
5. *Easements for support—Remedy.*—Every person is entitled, *ex jure naturæ*, to support for his land from the adjacent or subjacent soil. And when deprived thereof through the wilfulness, negligence, or want of care and skill of another, he is entitled to compensation in damages; and usually his remedy is by action at law. *Salamone v. Keiley*, 86.
6. *Ways—Dominant and servient lands.*—Easements follow lands into assignee's hands. Division of dominant tract does not destroy easement. Owner of any portion may claim right so far as applicable to his portion; provided division does not impose additional charge on servient tracts. *Linkenhoker v. Graybill*, 835.
7. *Way ex necessitate.*—If one take conveyance of land surrounded by lands of his grantors and others, he can enforce a right of way under plea of necessity against none but his grantors. *Idem*.
8. *Case at bar.*—L. bought part of the R. lands knowing how they were situated as to public roads, and that they were entitled to a right of way in one direction over G.'s lands to a public highway, and contracted with his grantors for a right of way out to a public highway over other lands than G.'s. He cannot now be permitted to abandon

EASEMENTS (*continued*).

his said rights of way and have a public road established for his own exclusive use, and to the great damage of G., over G.'s land in another direction to a public highway. *Idem*.

EJECTMENT.

1. *Adverse claimant*.—But under Code 1873, chapter 131, sections 4 and 5, the proper remedy is by an action of ejectment, where the owner holds the legal title, but has not actual possession, and another asserts an adverse claim to the land, but has not actual possession of it. In such case equity has no jurisdiction. *Stearns v. Harman*, 48.

EMINENT DOMAIN.

Municipal corporations—Condemnation of land. *Roanoke City v. Berkowitz*, 616.

ENCUMBRANCE.

Warranty—Purchaser for value without notice—Set offs. *Massie v. Heiskell*, 789.

EQUITABLE JURISDICTION AND RELIEF.

1. *Quia timet—Cloud on title*.—On the principle of *quia timet*, a court of equity will entertain a suit by the owner *in possession* of land, to remove a cloud from his title, by annulling a deed that, by mistake or fraud conveys the land to another, who makes adverse claim thereto, but brings no suit. *Stearns v. Harman*, 48.
2. *Ejectment—Adverse claimant*.—But under Code 1873, chapter 131, sections 4 and 5, the proper remedy is by an action of ejectment, where the owner holds the legal title, but has not actual possession, and another asserts an adverse claim to the land, but has not actual possession of it. In such case equity has no jurisdiction. *Idem*.
3. *Trustee and feme covert c. q. t.—Improvement of trust subject—Defect of care and skill—Remedy*.—Where a trustee and his *feme covert c. q. t.*, jointly undertake to improve the lot held by him in trust for her separate use, and in so doing fail to use due care and skill, whereby the owner of the adjacent land is damaged, a court of equity hath jurisdiction to ascertain and allow the claims of the injured party for compensation, and to subject the trust property to its satisfaction—either because of the trust, or because of the separate estate involved in the litigation—each being equally a subject of equity jurisdiction. *Salamone v. Keiley*, 86.
4. *Parol evidence—Correcting mistakes*.—There can be no question as to the power and duty of courts of equity to reform a written instrument between living parties and for a valuable consideration, on account of a mistake of the draftsman, though proven by parol evidence;

EQUITABLE JURISDICTION AND RELIEF (*continued*).

but not where the party seeking to reform the writing is a mere volunteer, and the other party is dead. *White v. Campbell*, 180.

5. *Remedy at law*.—Where there are conflicting claims to personal property, possessing no *pretium affectionis*, the remedy is adequate at law, and equity will not take cognizance of the case, though one of the parties be a trustee, claiming the property under a trust-deed. *Moore v. Steelman*, 331.

6. *Injunction—Irreparable injury*.—Where irreparable injury is imminent, against which there is no adequate protection at law and which is not compensable in damages, equity will take jurisdiction by injunction. The bill must set up the facts which exhibit the imminence and irreparableness of the injury. *Idem*.

7. *Injunction—Dissolution*.—Where the answer denies all the grounds of equity set up in the bill, and those grounds are unsustained by proof, the injunction must necessarily be dissolved. *Idem*.

8. *Case at bar*.—Under decree in creditor's bill, filed in 1870, the debtor's real estate was sold in parcels. To G. and to L. each, a distinct parcel was sold and conveyed by defined bounds. The suit was dismissed in 1876. Four years afterwards, L. having got possession of thirty-two acres of the parcel conveyed to G., the latter brought unlawful detainer to recover it; and L., without the said suit having been restored to the docket, filed therein against G. his petition, and obtained an injunction restraining proceedings under the unlawful detainer, on the ground that a mistake had been made in the conveyance to him, whereby said thirty-two acres had been omitted from his, L.'s, boundary. G. objected to the filing of the petition, demurred to it, and answered it, denying all fraud, and that L. had got all the land he had bought, and the contrary thereof was not established by L., but the circuit court overruled the objection and demurrer, and decreed that G. should convey to L. the said thirty-two acres. On appeal,

HELD:

1. The objection to the filing of the petition in the cause which had been dismissed, should have been sustained.
2. The demurrer to the petition as an original bill, should have been sustained, as it was without equity, there being no privity between L. and G.
3. If L. had any remedy, it was at law, against the commissioners who made the sale and conveyance to him; or in chancery, against the creditors of M., who participated in the proceeds of the sales of his lands.
4. Upon the merits, L. had no case, as he did not show that he had not received, apart from the thirty-two acres, as much land as he had bought. *Garnett v. Loven*, 456.

EQUITABLE JURISDICTION AND RELIEF (*continued*).

9. *Wife's land—Joint sale—Trust.*—Where wife joins with husband in conveying her land on condition that proceeds be applied to payment of a debt binding her children's land, a trust is thereby created, which a court of equity will enforce against husband, though the bonds for said proceeds be made payable to him. *Barnes v. Trafton*, 524.
10. *Charitable uses—Common law—43 Elizabeth—Act of 1839.*—At common law chancery courts had jurisdiction to enforce bequests for charitable uses. Statute of 43 Elizabeth did not confer such jurisdiction, but only created an auxiliary remedy by commission, &c. Said statute was local, and never in force here. But if it was general in its operation in some respects, it was not repealed by the Act of 1792, but in those respects was preserved by the saving clause of that act. In any event, the Act of 1839, (Code 1873, chap. 77,) clearly validates and makes enforceable all gifts for such purposes, subject to certain restrictions therein contained. *P. Episcopal Education Society v. Churchman's rep's*, 718.
11. *Mistake—Equitable relief.*—It is one of the original grounds of equity jurisdiction to amend an instrument made under a mutual mistake of fact, so as to do justice to all concerned, and place them as nearly as practicable in *statu quo*. And it matters not whether the mistake was as to the factors, the mode, or the result of the calculation. *Massie v. Heiskell*, 789.
12. *Idem—Equity does nothing by halves.*—Where, under mutual mistake of fact, vendor grants more than vendee bargained or paid for, and a court of equity affords relief upon vendor's prayer, by allowing him compensation for the excess, his claim for such compensation is not a mere personal demand against vendee, but the title is deemed to be still in vendor as to such excess as security for the payment of said compensation, although the deed, as executed, reserved no lien on the purchase money. *Idem*.
13. *Resulting trusts—Liens—Set-offs—Case at bar.*—From ancestor's estate there were shares going to I., to J., to P. and to P.'s ward. I. and P. jointly purchased land, and used all the shares in paying for it. Then, I. sold to P. her half of the land, and for part of the price took three bonds of P., with J. as surety, payable to I.'s husband, who assigned them for value to S. T. and B. In a creditor's suit to ascertain debts and liens against P.'s estate—

HELD:

1. P.'s ward has a paramount lien on the entire land to the extent his share was used in paying for it.
2. J. has an equal lien with P.'s ward, on the entire land to the extent his share was used in paying for it, *unless* the transaction

EQUITABLE JURISDICTION AND RELIEF (*continued*).

between P. and J. as to this use of J.'s share, made P. individually the debtor therefor to J., and destroyed his lien.

3. But if such lien remains in favor of J., he is entitled to set off the amount thereof *pro tanto*, against the bonds of P. and himself to I.'s husband, in whose hands soever they may be found. *Paxton v. Stuart*, 873.

ESTOPPEL.

1. *Written evidence—Parol.* A party to instruments in writing, in the absence of all pretence of fraud, is estopped from proving that he did not read the instruments before executing them, and thus by parol obviate the effect of written evidence. *Ware v. Starkey*, 191.
2. *Warranty of title.*—Where one conveys land with general warranty, whereof at the time he has not the title, but afterwards acquires it, such acquisition enures to the grantee. The warrantor is estopped from denying he had the title. *Gregory v. Peoples*, 355.
3. *Bankruptcy—Estoppel.*—A discharge in bankruptcy releases the warrantor from liability for covenants broken, but does not affect the estoppel, because the covenant runs with the land. *Idem*.
4. *Idem—Resulting trust.*—Where one having only the equitable title, conveys the land with general warranty; then is discharged in bankruptcy; and afterwards, *with another's money*, buys the land, at a resale thereof for the unpaid purchase money, and obtains to himself a conveyance thereof, such title *does not* enure to his grantee, and he is *not estopped* to deny he had the title, because a trust resulted in favor of him whose money bought the land. *Idem*.
5. *Assignor and assignee—Silence.*—Where, after notice of assignment, debtor expressly or impliedly promises to pay the debt, he is estopped from setting up any defence he had against assignor. Mere silence will not operate such estoppel. *Stebbins & Lawson v. Bruce* 389.
6. *Joint-stock companies—Stockholders.*—Where a vendor's lien exists on the real estate of the corporation, represented by a past due note, and the stockholders agree with the creditors of the corporation, that the latter shall give the corporation further time, the corporation will satisfy the vendor's lien, and convey its property free from liens, in trust to secure those creditors, and one of the stockholders shall satisfy that lien and take an assignment thereof to himself, he is estopped from claiming that lien as his own property, and an assignee from him *without* notice, if the note be *past due*, or an assignee from him *with* notice, if the note be *not* past due, stands in no better position than his assignor; and the trust deed lien of the creditors hath precedence. *Hardy v. Norfolk Manufacturing Co.*, 404.
7. *Res judicata—Parol evidence.*—Where judgment or decree is relied on as estoppel, and pleadings and proceedings in former suit leave

ESTOPPEL (*continued*).

it doubtful what was the issue, or state of facts whereon the judgment or decree was rendered, parol evidence is admissible in subsequent suit to show what was actually in issue and determined by former suit. *Withers' adm'r v. Sims*, 651.

8. *Res judicata—Estoppel*.—All matters presented and received, or presentable to sustain the particular demand litigated in prior suit, and all matters presented or presentable under the issue to defeat such demand, are concluded by the judgment or decree in the former suit. *Idem*.

EVIDENCE.

1. *Criminal Proceedings—Lascivious cohabitation*.—To sustain an indictment under sect 7, chap. 7, Criminal Procedure of 1878, page 302, the evidence must establish that the parties, not being married, lewdly and lasciviously associated and cohabited—that is, lived together in the same house as man and wife live together. *Jones' case*, 18.
2. *Committee of Lunatic—Witnesses competency—Re-examination of witnesses—When*. *Carter v. Edmonds*, 58.
3. *Torts—Damages*.—In mitigation of damages, in an action for false imprisonment, it is allowable on cross-examination to prove that the plaintiff had boasted that he had gained a great reputation from his arrest and imprisonment. *Johnston v. Moorman*, 131.
4. *Post-admissions of assignor*.—A letter written by a distributee, after assigning his share of the estate, is not admissible as evidence for any purpose in suit to settle the estate. *Strother v. Mitchell*, 149.
5. *Estoppel—Written evidence—Parol*.—A party to instruments in writing, in the absence of all pretence to fraud, is estopped from proving that he did not read the instruments before executing them, and thus by parol obviate the effect of written evidence. *Ware v. Starkey*, 191.
6. *Extrinsic*.—Where a written contract is perfect in itself and its terms are clear and intelligible, parol testimony is inadmissible to contradict, vary, or materially to affect it by way of explanation. *Hughes v. Tinsley & Bro.*, 259.
7. *Criminal practice*.—Evidence that the hands, knife, &c., of the prisoner were smeared with blood immediately after the homicide, is admissible, though there was no chemical analysis. *Barbour's case*, 287.
8. *Idem—Idem—Cumulative*.—After the argument has commenced, it is too late to admit mere cumulative evidence. *Idem*.
9. *Idem—Counsel—Prisoner's statement*.—Much latitude is allowed counsel in argument, but they should not relate to the jury the prisoner's version as *the statement of the accused*, where the latter could not himself testify. *Idem*.
10. *Fraud—Proof*.—The evidence of fraud must be sufficient to satisfy the

EVIDENCE (*continued*).

conscience of the court, but may, and generally must, be circumstantial. In the case here by such evidence fraud is proved. *Moore v. Ullman*, 307.

11. *Assignor—Subsequent declarations*.—Declarations made and letters written by assignor subsequent to assignment, are inadmissible as evidence against his assignee. *Daily's ex'r v. Warren*, 512.
12. *Res judicata—Parol evidence*.—Where judgment or decree is relied on as estoppel, and pleadings and proceedings in former suit leave it doubtful what was the issue, or state of facts whereon the judgment or decree was rendered, parol evidence is admissible in subsequent suit to show what was actually in issue and determined by former suit. *Withers' adm'r v. Sims*, 651.

EXPERTS (*See Witnesses*, 3).**FIDUCIARIES**.

1. *Lunatic's committee—Ex-parte settlements*.—A confirmed report of an *ex-parte* settlement of a fiduciary's accounts is *prima facie* correct, and can be surcharged or falsified only by suit for the purpose within proper time. This is equally true *quoad* such settlements of the accounts of the committee of a lunatic. *Carter v. Edmonds*, 58.
2. *Idem—Idem—Antecedent debt—Statute of limitations*.—It is proper for such committee to include, in his *ex-parte* settlement of accounts as such, a debt due from the lunatic's estate to such committee before his appointment. Such, in fact, is his only remedy, as he could sue neither himself nor his predecessor. After confirmation of the report of the settlement, such debt would, like any other item of the account, be beyond the operation of the statute of limitations. *Idem*.
3. *Practice in equity—Guardian and sureties*.—In suit against guardian and his sureties by ward, a joint decree may at once be rendered against them on their official bond, without exhausting the guardian before going on his sureties. *Barnes v. Trafton*, 524.
4. *Personal representative—Powers*.—An administrator, as such, is without authority to make sale of his intestate's real estate. *Litterall v. Jackson*, 601.
5. *Personal representatives—Heirs, &c.*—Judgment against the first in suit to which the last were not parties, affects not the last for want of privity; and is not evidence against them in suit to subject the decedent's real estate; and Code 1873, ch. 127, § 3, does not alter the rule. *Watts v. Taylor's adm'r*, 627.
6. *Idem—Judgment creditor*.—Yet, suit against personal representatives jointly with heirs, &c., by creditor of decedent, to collect out of real estate or otherwise, bond debt whereon judgment existed against personal representatives, is maintainable by evidence other than said

FIDUCIARIES (*continued*).

judgment, though said judgment be set forth in the bill, the heirs, &c., having as full opportunity to defend against the debt as though no judgment existed. *Idem*.

7. *Trusts—Possessors of trust property—Liability.*—Trusts are enforced not only against regularly appointed trustees, but also against all persons who come into possession of trust property with notice of the trust. *Hobson v. Whillow*, 784.
8. *Idem—Purchasers with notice—Liability.*—Purchasers or grantees of trust property, with notice of the trust, though they have paid the entire consideration, themselves become trustees, and liable to the *cestuis que trust* for the fulfillment of the trust. *Idem*.

FOREIGN ATTACHMENTS (*See attachments*).

FRAUD.

1. *Proof.*—The evidence of fraud must be sufficient to satisfy the conscience of the court, but may, and generally must, be circumstantial. In the case here by such evidence fraud is proved. *Moore v. Ullman*, 307.
2. *Purchasers for value without notice.*—On doubtful evidence fraud must not be assumed. It must be distinctly alleged in the bill, and clearly proved. And so, of the defence of purchaser for value without notice. *Gregory v. Peoples*, 355
3. *Statute of limitations—Mistake, &c.—Discovery.*—Cases of fraud, trust and mistake, are not within the statute of limitations. At all events, in equity, in cases of mistake, as in cases of fraud, the statute does not begin to run until the discovery of the mistake. *Massie v. Heiskell*, 789.

FRAUDULENT CONVEYANCE.

1. *Innocent purchaser.*—It is not enough that the purpose of the grantor be fraudulent. Knowledge of such purpose must be clearly brought home to the alienee. Where the latter has denied such knowledge on oath, it cannot be held that his denial is overthrown by mere circumstances of suspicion adduced against him. *Batchelder v. White*, 103.

GUARDIAN AND WARD (*See Fiduciaries*).

HABEAS CORPUS.

1. *Where it lies not.*—The remedy for mere errors in proceedings of courts of competent jurisdiction, is by writ of error or appeal, and not by writ of *habeas corpus*. *Ex-parte Rollins*, 314.
2. *Where it lies.*—Where the proceedings, whether civil or criminal, under which a party is detained in custody are void, as where the court has no jurisdiction, or where the statute under which the proceedings are

HABEAS CORPUS (*continued*).

inaugurated is unconstitutional, the same are reviewable on *habeas corpus*, and the party may be discharged. *Idem*.

HEREDITAMENTS.

1. *Presumptions—Hereditaments*.—In principle there is no difference as to the acquisition of rights, whether the subject be corporeal or incorporeal; but the statute of limitations introduces a difference. *Cornett v. Rhudy*, 710.
2. *Idem—Corporeal hereditaments—Statute of limitations*.—As to the possession requisite to acquire title to things corporeal, the statutory period prevails. *Idem*.
3. *Idem—Incorporeal hereditaments—Prescription*.—Twenty years adverse, exclusive, undisturbed possession of things incorporeal, affords conclusive presumption of title. *Idem*.
4. One is entitled to the benefit of all water on his lands, but another may acquire a right thereto by twenty years adverse, exclusive and undisturbed occupation thereof. *Idem*.

INDICTMENT.

House-breaking—Ownership of house.—An indictment charging that "the prisoner, on, &c., a certain mill-house not adjoining to or occupied with the dwelling-house of F." &c., sufficiently alleges the ownership of the mill-house to be in F., and is sufficient in law. *Webster's case*, 598.

INJUNCTIONS.

See Equitable Jurisdiction and Relief, 6, 7. *See Practice in Chancery*, 15, 25.

INSTRUCTIONS.

1. *See Practice at Common Law*, 5, 6.
2. *Practice at Common Law*.—An instruction is not considered as abstract where the pleadings show that it might apply to the case. *Johnston v. Moorman*, 131.

INSURANCE COMPANIES.

1. *Insurance—Specific performance—Bill*.—Equity will enforce performance of a contract of insurance made with an agent having authority to issue policies or to bind the company to issue policies, in favor of one who has paid the premium. But the bill must on its face distinctly state that such contract was made, and show when, where, how and by whom it was made, and that the person making it had authority to bind the company. *Haden v. Farmers and Mechanics Fire Association*, 683.
2. *Idem—Agents—Powers*.—Insurance company may empower its agents to make contracts of insurance, or may limit their authority to solicit-

INSURANCE COMPANIES (*continued*).

- ing applications, which are to be forwarded to its board of directors, who alone may be authorized by its constitution and by-laws to make such contracts. *Idem*.
3. *Idem—Charter and by-laws—Notice*.—Persons dealing with a corporation are affected with notice of the provisions of its charter, constitution and by-laws. *Idem*.
 4. *Idem—Contract—Agent to solicit*.—An agent whose powers are limited by the charter, constitution or by-laws of the company, to receiving and forwarding applications for insurance, together with the premiums, to the company for acceptance or rejection, can make no contract of insurance binding the company. *Idem*.
 5. *Misrepresentations—Title—Encumbrance*.—Any material misrepresentation will avoid a policy. But such is not the effect where the misrepresentation, if any, was simply technical, and unintentional and immaterial withal. *Idem*.

INSURANCE POLICIES.

Misrepresentations—Title—Encumbrance. See *Insurance Companies*, 5.

INTEREST.

1. *Contracts—Construction*.—Contract of sale, dated August 26th, 1873, says the bonds for the purchase-money are "to bear interest from this date." The trust-deed describes the bonds as "dated September 10th, 1873, with six per cent. interest from August 26th, 1873." The bonds say, "with six per cent. interest from date above," when there is no "date above," except the date of the maturity of the bond. Receiver collected the bonds with interest only from their maturity.

HELD:

- The bonds bear interest from the date of the contract, August 26th, 1873, till paid. *Ware v. Starkey*, 191.
2. *Usury—Judgment*.—Where an instrument on its face reserves more than the legal rate of interest, it is usurious in its inception, and judgment shall be rendered for the principal sum only, although the defendant may have filed no plea of usury. *Turner v. Turner*, 379.
 3. *Idem—Borrower—Relief*.—Where a borrower who has paid no part of the principal, or usurious interest, comes into chancery under Code 1873, ch. 137, sec. 12, he must be required to pay only the principal sum loaned or forborne. *Idem*.
 4. *Idem—Payments—Application*.—Where payments have been made on the usurious contract, which are merely credited on the bond, and not applied specially, borrower is entitled to have such payments deducted from the principal sum loaned or forborne. *Idem*.
 5. *Idem—Application of payments—Rule—Exception*.—To the rule that the creditor may apply payments when the debtor does not, there is

INTEREST (*continued*).

the well recognized exception that he cannot apply them to what is no legal or equitable demand against the payer. *Idem*.

6. *Idem—Quære*.—Whether or not the creditor can apply payments to usurious interest where debtor has made no application. *Idem*.

INTER-STATE COMMERCE.

Unconstitutional.—Sections 39 and 40, of chapter 1, of the revenue laws of Virginia (Acts 1883-'84, p. 582), are unconstitutional, because discriminating in favor of publishers of books, &c., in this state, and against such publishers in other states, thus contravening clause 3, section 8, article 1, of the Federal constitution, which gives Congress the right to regulate commerce between the several states. *Ex parte Rollins*, 314.

JEOPAILS.

Pleadings—Demurrer. *Roanoke Land and Improvement Co. v. Karns & Hickson*, 589.

JOINT-STOCK COMPANIES.

1. *Stockholders*.—To the extent of his stock, each stockholder is liable individually for the debts of the corporation. Where stockholder pays the debt of the corporation and takes an assignment thereof to himself, he cannot revive that debt by assigning it to a third party. *Hardy v. Norfolk Manufacturing Co.*, 404.
2. *Idem—Lien on property of*.—Where real estate, whereon is a lien, is conveyed to a joint-stock company, and a stockholder pays off the lien and takes an assignment thereof, the lien is extinguished as to the creditors of the corporation, and cannot be revived by his assignment thereof to a third party. *Idem*.
3. *Idem—Idem—Estoppel*.—Where a vendor's lien exists on the real estate of the corporation, represented by a past due note, and the stockholders agree with the creditors of the corporation, that the latter shall give the corporation further time, the corporation will satisfy the vendor's lien, and convey its property free from liens, in trust to secure those creditors, and one of the stockholders shall satisfy that lien and take an assignment thereof to himself, he is estopped from claiming that lien as his own property, and an assignee from him *without* notice, if the note be *past due*, or an assignee from him *with* notice, if the note be *not past due*, stands in no better position than his assignor; and the trust deed lien of the creditors hath precedence. *Idem*.

JUDICIAL OFFICERS. *Liability*. (*See Officers* 1, 2, 3).

JUDICIAL SALES.

1. *See Sales*, 1, 2, 3, 4, 5, 6, 7, 8.
2. *Re-sale. See Practice in Chancery*, 2.

JUDGMENTS.

1. *Coupons—Judgment against State*—The action under statute of January 28th, 1882, Acts 1881-'2, is in form against the collector; but being to recover a demand growing out of his acts done *colore officii*, is substantially against the Commonwealth, and the judgment is likewise. *Brown, Davis & Co. v. Greenhow*, 118.
 2. *Decrees—Judgment creditors*.—By Code 1873, chapter 182, sections 1 and 2, a decree for specific property or requiring payment of money, has the effect of a judgment, and persons entitled thereto are judgment creditors. *Hutcheson v. Grubbs*, 251.
 3. *Judgment liens—Enforcement in equity*.—Lien of judgment is a creature of statute, and cannot be enforced in equity after it ceases to be enforceable at law. *Idem*.
 4. *Idem—Construction of statutes*.—The language of the statute, Code 1873, chapter 182, section 9: "The lien of a judgment may always be enforced in a court of equity," implies only a purpose to confer jurisdiction on courts of equity to enforce the lien, whether the remedies at law are adequate or not. *Idem*.
- See Judgments and Decrees.*

JUDGMENTS AND DECREES.

1. *Judgments—Relation back—General rule—Exceptions*.—As a general rule, a judgment rendered at any time during a term, relates back to the first day of the term, as if rendered then. This, however, is not always so. The rule does not apply to a judgment rendered during a term in a case which was in such a condition that the judgment could not have been rendered on the first day of the term. *Yates & Ayres v. Robertson & Berkeley*, 475.
2. *Pleadings—Demurrer—Jeofails*.—Judgment will not be reversed for defect, imperfection, or omission in the pleadings, unless in court below there was a demurrer. Code 1873, ch. 177, § 3. But a failure to state any cause of action at all, is not cured by the statute. *Roanoke Land and Improvement Co. v. Karn & Hickson*, 589.
3. *Personal representatives—Heirs, &c.*—Judgment against the first in suit to which the last were not parties, affects not the last for want of privity; and is not evidence against them in suit to subject the decedent's real estate; and Code 1873, ch. 127, § 3, does not alter the rule. *Watts v. Taylor's adm'r*, 627.
4. *Idem—Judgment creditor*.—Yet, suit against personal representatives jointly with heirs, &c., by creditor of decedent, to collect out of real estate or otherwise, bond debt whereon judgment existed against

JUDGMENTS AND DECREES (*continued*).

personal representatives, is maintainable by evidence other than said judgment, though said judgment be set forth in the bill, the heirs, &c., having as full opportunity to defend against the debt as though no judgment existed. *Idem*.

5. *Decrees—Null quoad persons not parties.*—A decree is a mere nullity as to persons not named as party in the bill, and against whom no allegations are made and no relief is prayed. *Cronise v. Carper*, 878.

JUDGMENT LIENS. (*See Judgments*, 3, 4.)

JURISDICTION.

1. *Appellate Court—Jurisdiction—Unconstitutional.*—Act of March 12th, 1884, is unconstitutional so far as it confers upon this court jurisdiction in all cases of coupons arising under act of January, 14th, 1882, without regard to the amount in controversy, being in conflict with Article VI. of State Constitution fixing minimum jurisdictional amount in cases purely pecuniary at \$500. *McIntosh v. Braden*, 217.
2. *County courts.*—A county court acting under the statute authorizing county courts to purchase salt, is exercising a special authority, and it must appear from the record that the justices were summoned, or that a majority were present, when a bond was executed for salt purchased, or the bond will be held to be null and void. *Chesterfield Co. v. Hall's ex'or*, 321.
3. *Idem—Presumptions.*—Where a court of general jurisdiction has conferred upon it special powers by special statutes, which are only exercised *ministerially*, and not *judicially*, no presumption of jurisdiction will attend its judgments, and the facts essential to the exercise of the special jurisdiction must appear on the face of the record. *Idem*.
4. *Appellate jurisdiction—Dissolution of injunctions.*—From an order overruling an injunction and adjudicating the principles of the cause, an appeal lies. *Kahn v. Kerngood*, 242.
5. *Idem—Matter in controversy.*—Where a deed conveys property alleged therein to be worth over \$500, and is assailed as fraudulent by a creditor whose debt is less than \$500, as between the grantee and the assailing creditor, the matter in controversy is the value of the property, and not the amount of the debt; and in the absence of proof to the contrary, the alleged must be deemed the actual value of the property. *Idem*.
6. *Criminal jurisdiction and proceedings.*—Questions of jurisdiction may be raised by demurrer; by motion for instructions; by motion in arrest of judgment, on general issue; and by writ of error. *Ryan's case*.
7. *Idem—Case at bar.*—Prior to act of January 31, 1884, incorporating the

JURISDICTION (*continued*).

city of Roanoke, and to act of February 25, 1884, creating the hustings court of that city, the county court of Roanoke county had jurisdiction of all offences committed within that county, which embraced what afterwards became the limits of that city. In May, 1884, in that hustings court, M. R. was indicted for the murder of her husband, who died January 27, 1884, within those limits.

HELD:

The hustings court had no jurisdiction over the offence. *Idem*.

8. *County courts*.—County courts possessed general jurisdiction concurrent with circuit courts until the enactment of sections 2 and 3 of chapter 124, Code 1873, except as to sale of lands of persons under disabilities. *Litterall v. Jackson*, 604.
9. *Appeals—Jurisdiction—Plaintiff appellant—Defendant appellant*.—If plaintiff's claim exceed \$500, and he apply for appeal, this court hath jurisdiction, though the judgment or decree be for less. But if the judgment or decree be for less than \$500, principal and interest, at the date of the decree, and the defendant apply for appeal, this court hath not jurisdiction. *Duffey & Bolton v. Figgat*, 664.
10. *Idem—Special commissioners—Defalcation*.—Where purchasers at judicial sale are compelled to pay a second time a part of purchase money, by means of the special commissioner's failure to give required bond, and his default in paying over money collected of them, the jurisdiction of this court to hear their appeal, depends on the amount of the defalcation, and not on the amount of his official bond. *Idem*.

JURORS.

1. *Construction of statutes—Exemption from jury duty*.—Where, under section 16 of the act approved March 17th, 1884, to provide for the government of Virginia volunteers, Acts 1883-'84, page 615, a roll of a volunteer military company is filed with the clerk of the court, the members thereof are exempt from summons for jury duty, and, if summoned, need not attend to make their excuses. *Miller's case*, 33. See *Criminal Jurisdiction and Proceedings*, 10, 11, 12, 13. *Hall's case*, 555.

LACHES.

1. *Laches* is neglect to do something one ought to do. Mere lapse of time, unaccompanied by circumstances affording evidence of a presumption that the right has been abandoned, is not considered "laches." *Wissler v. Craig*, 22.
2. *Indicia of laches*.—Where, from delay, no correct account can be taken, and any conclusion the court may arrive at must at best be conjectural, and the original transactions have become so obscured by lapse

LACHES (*continued*).

of time, loss of evidence, and death of parties, as to render it difficult to do justice, the case will be considered as a case of "laches," and the court will not relieve the plaintiff. *Idem*.

3. *Case at bar* is one which, tested by the recognized criteria, is not a case of such laches as should prevent a court of equity from affording relief to the plaintiff. But it is one in which the maxim, *caveat emptor*, is clearly applicable to the defendant as a purchaser at a judicial sale of land included in an unreleased, duly recorded trust deed. *Idem*.
4. *Abandonment of rights*.—It is well settled that *laches* cannot be predicated of those who are ignorant of their rights. Such defence is only permitted in equity to defeat an acknowledged right, on the ground of its offering evidence that the right has been abandoned. *Massie v. Heiskell*, 789.

LAND.

1. *See Easements*, 1, 2, 3, 4.

LEGACIES.

Advancements—Ademption.—Where one *in loco parentis* gives a legacy as a portion, and afterwards advances in the nature of a portion to same person, such advancement will be deemed an ademption of the legacy. But where the gift is given *before* the making of the will, and the will does not charge it as an advancement, the court cannot so charge it in settling the estate. *Strother v. Michell*, 149.

LEGITIMACY.

Smith v. Perry, 563. *Greenhow v. James' ex'or*, 636.

LEGISLATION.

Repealable. Supervisors v. Luck, 223.

LEWDNESS.

1. *See Title Criminal Jurisdiction and Proceedings*, 1.

LUNATIC.

1. *Lunatic's committee—Ex-parte settlements*.—A confirmed report of an *ex-parte* settlement of a fiduciary's accounts is *prima facie* correct, and can be surcharged or falsified only by suit for the purpose within proper time. This is equally true *quoad* such settlements of the accounts of the committee of a lunatic. *Carter v. Edmonds*, 58.
2. *Idem—Idem—Antecedent debt—Statute of limitations*.—It is proper for such committee to include, in his *ex-parte* settlement of accounts as such, a debt due from the lunatic's estate to such committee before his appointment. Such, in fact, is his only remedy, as he could sue neither himself nor his predecessor. After confirmation of the report

LUNATIC (*continued*).

- of the settlement, such debt would, like any other item of the account, be beyond the operation of the statute of limitations. *Idem*.
3. *Real estate*.—Code 1873, chapter 82, sections 49, 50, and 51, relating to sale, &c., of lunatic's real estate to pay his debts and maintain himself and family, does not apply to a case where *after death* of the lunatic it is sought to subject the real estate to the payment of his debts. *Idem*.
 4. *Practice in chancery—Lunatic defendant*.—Pending a suit against a lunatic represented by his committee, the lunatic dies, the committee *ipso facto* becomes *functus officio* and the suit abates, and must be revived and proceed in the name of the lunatic's personal representative and heirs; and all proceedings had after lunatic's death and before such revival, are void. *Paxton v. Stuart*, 873.

MANDAMUS.

1. *Removal of causes—Constitution*.—Acts of March 7th, 1884, Acts 1883-'84, page 424, directing that on motion, on twenty days' notice by any party, any suit or proceeding pending in a corporation court shall be removed, as of right, to the circuit court of said corporation, is not unconstitutional. *Town of Danville v. Blackwell*, 38.
2. *Idem—Mistrial—Waiver*.—In such a case there was ineffectual trial. At next term defendant, after notice under said act, moved for the removal of the case to the circuit court, and the corporation court denied the motion.

HELD:

1. Right of removal was not waived.
2. *Mandamus* is the remedy for refusal to remove. *Idem*.
3. *Constitutional officers—Withholding salaries—Remedy*.—The officer's remedy for the withholding of the salary attached to his office, is by *mandamus*. *Attorney-General v. Marye, Auditor*, 485.

MARRIAGES.

1. *Marriage of colored persons—Legitimacy of children*.—Under act approved 27 February, 1866, to legalize marriage of colored persons living together as husband and wife at the time of its passage, children of such persons are deemed legitimate whether born before or after the passage of said act, and whether any sort of marriage ceremony had taken place between the parents or not. *Smith v. Perry*, 563.
2. *Idem—Bastardy*.—In such cases, the question of bastardy must be considered as in any case where bastardy is alleged as to a child born during coverture, or born before and recognized afterwards. *Idem*.
3. *Legitimacy—Presumption*.—This law presumes legitimacy where husband recognizes the child as his, and impossibility of procreation is

MARRIAGES (*continued*).

not established, though the cohabitation had ceased before the passage of this act. *Idem*.

4. *Bastards in Virginia*.—They are persons born out of wedlock, lawful or unlawful, or not within competent time after termination of coverture, or if born out of wedlock, whose parents do not afterwards intermarry and the father acknowledges them, or who are born in wedlock when procreation by the husband is impossible. *Idem*.
5. *Lex loci—Lex domicilii*.—The law of the place of its celebration governs as to the forms of ceremony which constitute marriage. The law of the domicile governs as to the capacity of the parties. But the rule which requires that "a marriage valid where celebrated, is valid everywhere else," has no application to a marriage entered into in a foreign country, in contravention of the public policy and statutes of the country of the domicile of the parties which pronounce marriage between them not only absolutely void, but *criminal*. *Greenhow v. James' ex'or*, 637.
6. *Felonious marriage—Indictment—Onus probandi*. *Jones' case*, 538.

MARRIED WOMEN.

1. *Married woman's act—When she may sue and be sued at law*.—Act approved April 4th, 1877, amended March 14th, 1878 (Acts 1876-'77, page 333, and Acts 1877-'78, page 347), except that it confers on married women the right to sue and the liability to be sued *at law* on contracts made by her in relation to and for the disposal of her separate property, and on contracts made by her as a sole trader, confers no power or liability on her beyond what she had prior to its passage as to her separate estate, or what she had by the terms of settlement upon her. *Salamone v. Keiley*, 86.
2. *Trustee and feme covert c. q. t.—Improvement of trust subject—Defect of care and skill—Remedy*.—Where a trustee and his *feme covert c. q. t.*, jointly undertake to improve the lot held by him in trust for her separate use, and in so doing fail to use due care and skill, whereby the owner of the adjacent land is damaged, a court of equity hath jurisdiction to ascertain and allow the claims of the injured party for compensation, and to subject the trust property to its satisfaction—either because of the trust, or because of the separate estate involved in the litigation—each being equally a subject of equity jurisdiction. *Idem*.
3. *Separate estate—Alienation*.—A wife may make her separate estate liable for the debts of herself, her husband or any other person, unless the instrument creating the estate, expressly or impliedly, denies or limits such power, but the intention so to deny or limit must be clear. *Christian & Gunn v. Keen*, 369.

MARRIED WOMEN (*continued*).

4. *Conveyances for advances to husband*.—Where real estate is granted to a trustee for separate use of married woman, free from her husband's debts, to be disposed of upon her written request, for reinvestment, the proceeds to be held for her benefit upon like restrictions, and she, her husband and her trustee unite in deed conveying the property to secure advances of money to be made by another to her husband, she has the power of alienation, and the grant of special power to dispose of the property in a particular manner, does not divest her of her general powers to dispose of it in any other manner. *Idem*.
5. *Settlement to secure home*.—But where the settlement is not only to provide, but to secure a home for the wife and her children, the intention is manifest to withhold the power of alienation. *Idem*.
6. *Husband—Surety*.—Where the wife charges her property to secure a debt of her husband, she becomes the surety of her husband, and is entitled to all the rights of a surety. *Idem*.
7. *Specific performance—Contracts—Lands*.—It is well settled that a court of equity will not decree against a wife performance of her contract to convey her lands; nor against wife or husband performance of his or their contract to convey her lands. *Litterall v. Jackson*, 601.
8. *Wife's land—Joint-sale—Trust*. *Barnes v. Trafton*, 524.

MECHANICS LIENS.

1. *Construction of Statutes*.—The remedy by lien, under Code 1873, chapter 115, sections 2, 3 and 4, is a creature of statute unknown to the common law; and in order to entitle a contractor to its benefit, he must strictly pursue the statute. *Shackleford v. Beck*, 573.
2. *Idem—Account of work and material—Definition*.—The statute requires that a contractor seeking to secure the benefit of its provisions, shall file in the clerk's office an account (which is an itemized or detailed statement of the transactions to which it relates) of work done and materials furnished; and, therefore, a paper in the following words, *viz.*: "To balance of account rendered for work and labor done and material furnished for your house," is not sufficient to create the lien provided by the statute. *Idem*.
3. *Idem—Actual notice unavailing*.—The contractor, having failed to secure a lien on the house by his omission to fulfill the requirements of the statute, a purchaser of the house from the owner is not affected with liability for the contractor's claim, by reason even of actual notice of the account thereof. *Idem*.
4. *Sub-contractor—Owner*.—In suit of sub-contractor against owner for materials furnished general contractor, it is unnecessary to allege that any part of the price agreed to be paid remained due to latter from owner when notice was given. Acts 1874-5, p. 437, § 5. *Roanoke Land and Improvement Co. v. Karn & Hickson*, 589.

MECHANICS LIENS (*continued*).

5. *Notice*.—The mechanics' lien law as amended by act of 1874-5, p. 437, § 5, does not require sub-contractor to notify owner at the time the labor is done or the materials are furnished: it is sufficient if the notice be given at any time thereafter, and within twenty days after the building has been completed, or the work otherwise terminated. But he is not obliged to wait until other work on the building, with which he has no concern, is performed, before he gives his notice.
Idem.
6. *Notice—Affidavit—Liability of owner*.—As soon as sub-contractor has furnished labor or materials, he may give notice to owner, and may furnish the affidavit at any time within twenty days after completion of building, or termination of work. And without regard to state of accounts between owner and general contractor, owner, upon proper notice and affidavit, is liable, absolutely, to sub-contractor for amount named in affidavit. Code 1873, chap. 115, § 5, amended Acts, 1874-5, p. 437. *S. V. R. R. Co. v. Miller*, 821.
7. *Statute construed—Two-fold remedy*.—Section 8 secures to sub-contractor benefit of lien given general contractor by section 4, provided notice is given by former before lien is discharged. This remedy is additional to that conferred by section 5, which gives to sub-contractor, upon compliance with its requirements, the right to charge owner personally. Under section 8, regard is had to state of accounts between owner and general contractor; under section 5, none is had.
Idem.
8. *General contractor's failure—Owner's liability*.—Fact of general contractor's failure, and owner's necessity to complete the work, does not affect owner's liability for amount due sub-contractor for labor or materials. *Idem*.

MILITARY COMPANIES.

Members of exempt from jury duty—When. Miller's case, 33.

MISREPRESENTATION.

Insurance—Title—Incumbrance. Haden v. Farmers & Mechanics Fire Asso., 683.

MISTAKE.

1. *Correcting mistakes. See Equitable Jurisdiction and Relief*, 4, 11, 12.
2. *See Practice in Chancery*, 11.
3. *Statute of limitations—Mistake, &c.—Discovery*.—Cases of fraud, trust and mistake, are not within the statute of limitations. At all events, in equity, in cases of mistake, as in cases of fraud, the statute does not begin to run until the discovery of the mistake. *Massie v. Heiskell*, 789.

MULTIFARIOUSNESS.

See Practice in Chancery.

MUNICIPAL CORPORATIONS.

See Corporations, 1, 2, 3, 4, 5, 6.

MURDER.

See Criminal Jurisdiction and Proceedings, 6.

NEGLECTANCE.

1. *Negligent injuries — Contributory negligence — Compensation.*—Compensation cannot be recovered for injuries done by defendant's mere negligence, where plaintiff by his own ordinary negligence contributed to cause the injury, so that but for such contribution the injury would not have happened, except when the direct cause of the injury is the defendant's omission (after becoming aware of plaintiff's negligence) to use proper care to prevent the consequences of such negligence. *Rudd's adm'r v. N. & W. R. R. Co.*, 346.
2. *Idem—Case at bar.*—Boy of twelve, sent by parents to mind cows in field along railway, lay asleep on the track, and was run over by freight train 375 yards long, and killed. Train was running down grade without steam. Boy was lying, when struck, 226 yards from a public crossing, which was 892 yards from a curve from which boy was visible. Boy had been repeatedly found sitting and lying down and asleep on the track, and warned. When engineer saw boy on track, he made, in vain, every effort to stop train, by reversing engine, etc. On demurrer to evidence, court below decided for defendant company. On appeal :

HELD:

Plaintiff's evidence is insufficient to warrant the verdict. *Idem.*

NEGOTIABLE INSTRUMENTS.

1. *Acceptance—Payment.*—Payment, not acceptance merely, entitles acceptor to sue the drawer. *Christian & Gunn v. Keen*, 369.
2. *Theft—Maker's liability.*—Note payable to bearer has been delivered, stolen from the owner, and come to bona fide holder for value. Latter may recover on it against the maker. *Secus*, where the note has not been delivered, or if delivered, has been returned to maker, and stolen from him. *Branch v. Commissioners of Sinking Fund*, 427.
3. *Coupon bond—Theft of—Maker's liability—Case at bar.*—Two coupon bonds issued by the state of Virginia, payable to bearer, are redeemed by the state, and other bonds issued in their stead. Later the bonds were stolen from the state treasury, came into the hands of B., a bona fide holder for value without notice of the theft, and by B. were presented to the commissioners of the sinking fund, to be funded into other bonds of the state. The commissioners refused,

NEGOTIABLE INSTRUMENTS (*continued*).

on the ground that the bonds had been stolen from the state treasury. B. applied for a *mandamus*.

HELD:

Mandamus denied.

4. *Discharge*.—Payment of note at bank is either a sale or a discharge thereof. A sale, it cannot be without the bank's consent. And where the note is paid by a stranger bound for its payment at maturity, the note is thereby actually discharged, and cannot be re-issued by him so as to bind the parties thereto, or to keep alive a trust-deed executed to secure it, except with the knowledge and consent of those parties. *Citizens Bank v. Lay*, 436.
5. *Quære*.—When may suit be brought on a dishonored note? As soon as it is dishonored, or after business hours on the day of its dishonor, or on the next day after its dishonor? *Idem*.
6. *Discharge—Estoppel—Case at bar*.—C. purchased a lot and owed thereon \$2440, evidenced by his note secured by trust-deed on the lot. P. bought the lot of C., and, as part of the price, agreed to pay the note when due. When due, P. paid the note and took it up. It was not marked "paid," as P. told the note clerk he wanted to deposit it elsewhere as collateral. He did so deposit it with the Citizens Bank. Afterwards P. sold and conveyed the lot to L. The trust-deed had not been released, but P. told L. the note had been paid. Later, the bank had the lot advertised for sale to pay the note, and L. obtained an injunction.

HELD:

1. The transaction between P. and the bank at which the note was payable, discharged the note of C.
2. L. was entitled to rely on the statement of P. that the note had been paid, and was not estopped from denying its existence as a valid security, though P. might have been so estopped.
3. L. was a purchaser for value without notice, and it was proper to perpetuate the injunction in his favor. *Idem*.

NEGRO.

1. *Criminal proceedings—Negro—Colored Person—Definition*.—The term "negro" is identical in signification with the term "colored person," as defined by section 2, chapter 103, Code 1873; that is, "a person with one-fourth, or more, of negro blood." *Patterson's case*, 28 Gratt. 940. *Jones' case*, 538.
2. *Idem—Felony marriage—Indictment—Onus probandi*.—In order to sustain an indictment under section 8, chapter 7, Acts 1877-'78, making the intermarriage of a negro with a white person, a felony, it is necessary first to establish that the accused is a person with one-

NEGRO (*continued*).

fourth, or more, of negro blood, *id est*, a negro; and the burden of proving this lies on the commonwealth. *Idem*.

3. *Marriage of colored persons—Legitimacy of children—Bastardy—Bastards in Virginia.* *Smith v. Perry*, 563.

NEW TRIAL.

1. *Subsequent promise—Conflict of evidence.*—Where by letter assignee notifies debtor of assignment, and latter answers that assignor was heavily indebted to him and that he ought to have credit therefor, and it does not appear that assignee was induced to alter his position by the answer, and the testimony is conflicting, and the jury finds for the debtor, the verdict will not be disturbed. *Stebbins & Lawson v. Bruce*, 389.
2. *Pleadings—Demurrer—Jeofails.*—Judgment will not be reversed for defect, imperfection, or omission in the pleadings, unless in court below there was a demurrer. Code 1873, ch. 177, § 3. But a failure to state any cause of action at all, is not cured by the statute. *Roanoke Land and Improvement Co. v. Karn & Hickson*, 589.
3. *Appellate court.*—Refusal of court below to award new trial will not be reviewed unless all the evidence in some proper mode is certified to the appellate court. *S. V. R. R. Co. v. Miller*, 821.

NUDUM PACTUM. (*See Contracts*, 8.)

OBLIGATIONS.

Joint-obligation—Suit v. several—Defence by one. *Ashby v. Bell*, 811.

OFFICERS.

1. *Judicial officers—Liability.*—When acting within their jurisdiction, judicial officers are exempt in civil actions from liability for their official acts, although such acts are alleged to have been done maliciously and corruptly. *Johnston v. Moorman*, 131.
2. *Idem—Idem—Jury.*—In civil actions against such officers, acting within their jurisdiction, it is not for the jury to decide upon the question of the reasonableness of the grounds of the arrest. *Idem*.
3. *Idem—Idem—Case at bar.*—J., mayor of D., whilst acting in his judicial capacity, caused the arrest of M., who sued J. for damages for false imprisonment.

HELD:

J. was not liable to M. in damages for such arrest and imprisonment. *Idem*.

4. *Constitutional officers—Attorney-General—Compensation.*—By section 8, article 6, state constitution, the election and commissioning of an attorney-general is provided for, and it is directed that he shall perform such duties and receive such compensation as the law may

OFFICERS (*continued*).

prescribe. It is not within the power of the legislature itself to withhold from him the salary which is prescribed by law, nor to delegate such power to the auditor. *Attorney-General v. Marye, Auditor*, 485.

5. *Idem—Idem—Idem—Offset.*—The salary of the attorney-general is of constitutional grant, and of public official right, and the doctrine of *offset* cannot be applied to it. It is not liable to attachment, to garnishment, nor to assignment in bankruptcy, and upon principles of *public policy*, it has absolute immunity from detention for debt or counter claims. *Idem*.
6. *Idem—Withholding salaries*—The act of assembly passed November 24th, 1884, Acts (extra session) 1884, page 90, requiring the auditor to withhold the salary of any officer who is indebted to the state for money collected by him, or improperly drawn by him during his term of office, until the default is made good, is unconstitutional and void, so far as it affects constitutional officers. *Idem*.
7. *Idem—Idem—Remedy.*—The officer's remedy for the withholding of the salary attached to his office, is by *mandamus*. *Idem*.

PARTITION.

1. *Realty—Sale for partition—Proceeds.*—Where court of equity causes land to be sold for partition, it leaves it to the party entitled to the proceeds, to designate whether he will hold them as personalty, or as realty. And when, for any reason, that party is incapable of making such designation, the court will hold them subject to all the incidents of realty. *Turner v. Dawson*, 841.
2. *Idem—Case at bar.*—D.'s land was sold for partition, in suit for that purpose. One-third of proceeds was set apart for widow. D.'s daughter, A., was of age, unmarried, and a party to the suit, and afterwards married T., and, without having had issue, died in widow's lifetime. After widow's death, T. sued to recover share of A., his deceased wife, in the third—claiming it had been converted into personalty. There was no evidence that A., whilst *sui juris*, ever elected, or that any election for her in her lifetime, whilst she was *non sui juris*, had been made, that said third should be personalty.

HELD:

1. Said third of proceeds of sale in D.'s land is realty.
2. A.'s share passes to her next of kin.
3. Her widower has no interest in it. *Idem*.

PARTNERSHIP.

1. *Partnership property.*—Property bought for and appropriated to the purposes, and paid for with the funds of the partnership, is the property of the firm, though the legal title be held in the name of one of its members. *Hardy v. Norfolk Manufacturing Co.*, 404.

PARTNERSHIP (*continued*).

2. *Liabilities—Discharge*.—As one member of a partnership may create a liability on the firm, so one member may discharge the liability of the firm. *Idem*.

PAYMENT.

1. *Application*.—Where payments have been made on the usurious contract, which are merely credited on the bond, and not applied specially, borrower is entitled to have such payments deducted from the principal sum loaned or forborne. *Turner v. Turner*, 379.
2. *Application of payments—Rule—Exception*.—To the rule that the creditor may apply payments when the debtor does not, there is the well recognized exception that he cannot apply them to what is no legal or equitable demand against the payer. *Idem*.
3. *Quære*.—Whether or not the creditor can apply payments to usurious interest where debtor has made no application. *Idem*.
4. *Mistake—Presumption of payment*.—Claim for purchase money for excess of land conveyed under mutual mistake of fact, is unaffected by any lapse of time short of the period sufficient to raise the presumption of payment. And the existence of deeds conveying title and reserving no lien, cannot reduce the period of limitation to five years, because the averment and proof of the mistake, required the abrogation of the deed, at least *quoad* the purchase money for the excess over what was sold and paid for. *Massie v. Heiskell*, 789.

PERSONAL REPRESENTATIVES. (*See Fiduciaries.*)

PLEADINGS.

See Practice at Common Law, 8.

Amendment of pleadings—Plea of another suit pending. See Practice in chancery, 1, 3.

PRACTICE AT COMMON LAW.

1. *Willful torts*.—The proper remedy for a mere willful tort is by action at law. *Salomone v. Keiley*, 86.
2. *Easements for support—Remedy*.—Every person is entitled, *ex jure naturæ*, to support for his land from the adjacent or subjacent soil. And when deprived thereof through the willfulness, negligence, or want of care and skill of another, he is entitled to compensation in damages; and usually his remedy is by action at law. *Idem*.
3. *Improvement of property—Implied contract—Breach—Remedy*.—Where one undertakes to improve his own land, he impliedly contracts to use due care and skill, and to answer to the adjacent landowner for the consequences of his want of such skill and care. Where there is a breach of this implied contract, the party injured may waive the tort and maintain an action as for a breach of assumpsit. *Idem*.

PRACTICE AT COMMON LAW (*continued*).

4. *Bill of particulars*.—In action for damages, defendant's motion that plaintiff be required to file bill of particulars, is then denied, but at next term it is allowed, and plaintiff files the bill, and trial proceeds, without defendant's asking for time to consider of his defence, he cannot raise the objection in the appellate court. *Central Lunatic Asylum v. Flanagan*, 110.
5. *Instructions*.—It was not error in the court to instruct the jury in such action that, after the board's accepting the plaintiff's bond and furnishing him with a written contract, and after his executing it and delivering it to the president of the board, the president's failure to execute it could not deprive the plaintiff of any right under the contract; and that if thereafter, without any fault on plaintiff's part, the defendant board prohibited or prevented him from fulfilling the contract, they should find for the plaintiff for the labor done, the money expended, the materials furnished, and the profits he would have realized in the performance of the contract, had he been permitted to fulfill it. *Idem*.
6. *Idem*.—When instructions given cover the entire case and properly submit it to the jury, it is not error to refuse to give others. It is safest, however, for the court to give instructions asked for when they correctly propound the law and are relevant to any evidence in the case. *Idem*.
7. *Coupons—Tax-payers' remedy—Assumpsit*.—Assumpsit against collecting officer is the proper remedy of a tax-payer to recover money paid by him for taxes, after collector's refusal to accept coupons tendered in payment thereof, under act approved January 26th, 1882. Acts 1881-'82, page 37. *Brown, Davis & Co. v. Greenhow*, 118.
8. *Pleading—Special counts—Common counts*.—In the declaration to special counts alleging the tender of tax-receivable coupons to pay the tax, and the defendant's refusal to accept the coupons, and the latter's proceeding to collect the tax in money, when payment thereof was made under protest, the common counts for money had and received, &c., may be added. *Idem*.
9. *Judgment against State*.—The action under this statute is in form against the collector; but being to recover a demand growing out of his acts done *color'e officii*, is substantially against the commonwealth, and the judgment is likewise. *Idem*.
10. *Instructions*.—An instruction is not considered as abstract where the pleadings show that it might apply to the case. *Johnston v. Moorman*, 131.
11. *Torts—Evidence—Damages*.—In mitigation of damages, in an action for false imprisonment, it is allowable on cross-examination to prove

PRACTICE AT COMMON LAW (*continued*).

- that the plaintiff had boasted that he had gained a great reputation from his arrest and imprisonment. *Idem*.
12. *Judicial officers—Liability*.—When acting within their jurisdiction, judicial officers are exempt in civil actions from liability for their official acts, although such acts are alleged to have been done maliciously and corruptly. *Idem*.
 13. *Idem—Idem—Jury*.—In civil actions against such officers, acting within their jurisdiction, it is not for the jury to decide upon the question of the reasonableness of the grounds of the arrest. *Idem*.
 14. *Idem—Idem—Case at bar*.—J., mayor of D., whilst acting in his judicial capacity, caused the arrest of M., who sued J. for damages for false imprisonment.

HELD:

- J. was not liable to M. in damages for such arrest and imprisonment. *Idem*.
15. *Demurrer to evidence*.—It is well settled that by demurrer to the evidence, the demurrant admits the truth of all demurree's evidence, and all proper and reasonable inferences therefrom, and waives all his own evidence which is in conflict with, or tends to make a case different from the case of demurree's evidence. *Rudd's adm'r v. N. & W. R. R. Co.*, 546.
 16. *Appellate court—Record—Certificate*.—Nothing, not made part of the record by bill of exceptions, or by order of the court, can be regarded as such by the appellate court. The clerk can add nothing to the record, and his certificate that a deposition or other paper copied by him, was the evidence whereon the judgment was founded, is no part of the record. *Roanoke Land and Improvement Co. v. Karn & Hickson*, 589.
 17. *Idem—Pleadings—Demurrer—Jeofails*.—Judgment will not be reversed for defect, imperfection, or omission in the pleadings, unless in court below there was a demurrer. Code 1873, ch. 177, § 3. But a failure to state any cause of action at all, is not cured by the statute. *Idem*.
 18. *Province of jury*.—It is fundamental that, where the evidence is parol, any opinion given by the court as to the weight, effect or sufficiency of the evidence submitted to the jury, or any assumption of a fact as proved, is an invasion of the province of the jury, and is reversible error. *Cornett v. Rhudy*, 710.

PRACTICE IN CHANCERY.

1. *Plea of another suit pending*.—Where in suit in equity plea is presented of another suit in equity pending in same court, between same parties, concerning the same subject, it is not error to reject the plea,

PRACTICE IN CHANCERY (*continued*).

consolidate the causes, and proceed in them as in one cause. *Mosby v. Withers*, 82.

2. *Judicial sale—Re-sale.*—At judicial sale title is retained, bonds with personal security are taken, and, as additional security, collaterals are assigned by purchaser to commissinner. It is not error, in such case, for the court, without first exhausting the bonds and collaterals, to decree a re-sale of the land unless within a prescribed period the purchase money in arrears shall be paid; especially where the commissioner has reported that the collaterals cannot be made available without a chancery suit. *Idem*.
3. *Amendment of pleadings.*—Where, from a plea, which is unsustainable by evidence, or rejected as making no lawful defence, it nevertheless appears that certain necessary parties have been omitted, it is right to allow the bill to be amended by inserting the omitted parties. *Idem*.
4. *Bills without equity aided.*—Where a bill fails to state a case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been made in the pleadings. But a defective bill may be aided by the answer and the evidence. *Salamone v. Keiley*, 86.
5. *Multifariousness.*—Bill in equity against a number of distinct alienees of separate parcels of land, to set aside the several alienations as fraudulent and void, is not multifarious, though there be no charge of confederacy. The several defendants have one common interest centering in the point in issue, which is the alleged fraud in the disposition of the debtor's property. *Batchelder v. White*, 103.
6. *Foreign attachment—Bill demurrable—When.*—Neither under section 2, chapter 175, nor under section 11, chapter 148, Code 1873, can "a suit, in the nature of a foreign attachment," be maintained unless the claim asserted be actually due. Unless the bill avers that a debt is due the plaintiff from one who is non-resident of this State, and who has estate and effects in this State, it is demurrable. *Idem*.
7. *Premature hearing on merits.*—Where, in suit to remove encumbrance of a satisfied trust-deed, on demurrer, the bill is held to present a case meet for equity, and exhibits are filed tending to support such case, and the answer denies the identity of the property claimed by plaintiff with the property which had been conveyed to him, it is error for the court to determine the question of identity on the pleadings and exhibits without giving the parties full opportunity to take all desired testimony. Though the bill and exhibits may not, yet witnesses might establish the identity. *Bates v. Brown*, 126.
8. *Decrees—Who bound by.*—One not a party to the suit is not bound by any proceedings or decrees therein. *Strother v. Mitchell*, 149.
9. *Rehearing—Case at bar.*—T. held J.'s bond dated 1860, whereon M.

PRACTICE IN CHANCERY (*continued*).

and S. were sureties. In 1806, after death of the sureties, judgment was had on the bond against J. Under M.'s will J. is a legatee, and assigns to T. his legacy to pay the bond. In 1879, X., another legatee of M., sues for a settlement of the estate, and T. is made a party, and receives payment of the bond out of J.'s interest in the estate. In 1882, the master files a supplemental report, founded on a letter of J.'s dated 1880, and showing that J. had received from M., his mother, *before* she made her will, an advancement, which satisfied his legacy. In 1882, a decree was entered confirming this report. In 1883, M.'s executor sues administrator of S. claiming that the estate of the latter should refund half of the sum paid by M.'s estate to satisfy the bond, and based the claim on the said report so confirmed. In the suit of *X. v. M.'s executor*, in 1884, the administrator of S. asked leave to file petition to rehear and annul decree confirming said report.

HELD:

1. Decree of 1882, confirming supplemental report, was not binding on S.'s estate, it being rendered in a suit wherein said estate was unrepresented.
2. Letter containing admissions of assignor after the assignment, was not evidence, and no basis for the report.
3. Leave should have been given to file the petition. *Strother v. Xaupi*, 159.
10. *Reports*.—Master in his report must not go beyond the matters referred to him, and his report is a nullity so far as it relates to matters not referred to him. Therefore, when master gratuitously reports that certain bonds bear interest only from maturity, and there is no confirmation of so much of the report as relates to such gratuitous matter, the parties are not prejudiced thereby. *Ware v. Starkey*, 191.
11. *Enforcing trust-deeds—Correcting mistake*.—Debtor having sold the land as above stated, the master having reported as aforesaid, and the receiver having collected the bonds with no interest until after their maturity, it was competent for that debtor to bring his bill to enforce the trust-deed, or to reform any mistake in any part of the said writings, in order to collect the unpaid interest. *Idem*.
12. *Answer*.—Where bill sets forth a contract and the plaintiff's construction thereof, and the answer admits the contract and claims under it, but denies the correctness of the plaintiff's construction, this is not such a denial as *per se*, entitles the respondent to a dissolution of the pending injunction. *Hughes v. Tinsley & Bro.*, 259.
13. *Answers*.—The testimony of one witness, with corroborative circumstances, or circumstances alone, or documentary evidence alone, may overcome an answer that is responsive to the averments of the bill. *Moore v. Ullman*, 307.

PRACTICE IN CHANCERY (*continued*).

14. *Injunction—Dissolution*.—Where the answer denies all the grounds of equity set up in the bill, and those grounds are unsustained by proof, the injunction must necessarily be dissolved. *Moore v. Steelman*, 331.
15. *Injunctions*.—When on bill and answer denying all equity in the bill, there is a motion to dissolve an injunction, it is customary to dissolve; but for good cause the motion may be overruled, and the injunction continued till the hearing without any adjudication of the principles of the cause. *Kahn v. Kerngood*, 342.
16. *Demurrer*.—It is settled in this state that a demurrer in the form prescribed by the statute, and assigning no grounds, inserted in the answer is sufficient. And when the court has adjudicated the principles of the cause in favor of the plaintiff, the presumption is that it overruled the demurrer, though the record does not show what was done with it. *Matthews v. Jenkins*, 463.
17. *Assignors parties*.—Where one files petition in pending cause to assert claim as assignee to debt reported therein, the assignor must be made party to petition and summoned to answer. *Daily's ex'or v. Warren*, 512.
18. *Review and reversal—Witness*.—Decree directing payment of such debt to such petitioning assignee, will be reversed on petition of the assignor, who has not been made party and summoned to answer. And on hearing of such petition to re-hear, the assignor and a rival assignee are competent witnesses to prove the assignment to the latter and the consideration thereof. *Idem*.
19. *Guardian and sureties*.—In suit against guardian and his sureties by ward, a joint decree may at once be rendered against them on their official bond, without exhausting the guardian before going on his sureties. *Barnes v. Trafton*, 524.
20. *Report of commissioner*.—The principle is well established, that when a question of fact is referred to a commissioner, depending upon the testimony of witnesses conflicting in their statements and differing in their recollection, the court must, of necessity, adopt his report, unless in a case of palpable error or mistake. *Stuart & Palmer v. Hendrick*, 601.
21. *Bills—Multifariousness*.—A bill brought to obtain a construction of a will and the recovery of property held by several persons by titles derived under the same will, is not multifarious. *Withers' adm'r v. Sims*, 651.
22. *Jurisdiction—Remedy at law*.—Bill in equity will not lie merely to save necessity of several actions of ejectment. But where the title of all the parties to the property in controversy depends upon the construction to be given to the will, a bill will be entertained to construe the will and settle the title of several parties to the property at the same time. *Idem*.

PRACTICE IN CHANCERY (*continued*).

23. *Res judicata*—*Parol evidence*.—Where judgment or decree is relied on as estoppel, and pleadings and proceedings in former suit leave it doubtful what was the issue, or state of facts whereon the judgment or decree was rendered, parol evidence is admissible in subsequent suit to show what was actually in issue and determined by former suit. *Idem*.
24. *Res judicata*—*Estoppel*.—All matters presented and received, or presentable to sustain the particular demand litigated in prior suit, and all matters presented or presentable under the issue to defeat such demand, are concluded by the judgment or decree in the former suit. *Idem*.
25. *Injunctions*—*Dissolution*—*Continuance*.—It rests in the sound discretion of the court to dissolve an interlocutory injunction upon the coming in of the answer denying the equities of the bill, or to continue it to a final hearing on the merits, especially where fraud is the *gravamen* of the bill, or where dissolution would result in greater injury than continuance till hearing. *Jenkins & Cutchin v. Waller & Jordan*. 668.
26. *Joint obligations*—*Suit v. several*—*Defence by one*.—Where suit is on joint obligation, the bill is taken for confessed, and one of several defendants appears and disprove plaintiff's case, unless it be on some matter of defence which is purely personal to himself, plaintiff is not entitled to a decree against the others, but the bill must be dismissed. *Ashby v. Bell's adm'r*, 811.
27. *Appellate court*—*Commissioner's reports*.—It is well settled by repeated decisions of this court, that commissioners' reports, not excepted to, cannot be impeached before an appellate court in relation to matters which may be affected by extraneous testimony. *Idem*.
28. *Parties*—*Rule*.—All persons beneficially interested in object of suit must in general be made parties, so that all questions arising may be fully and finally settled. *Yost v. Porter*, 855.
29. *Sale for purchase money*—*Terms*.—Sale for purchase money will not be decreed where the property remains encumbered for purchase money due from plaintiff, without providing for discharge of such encumbrance. Terms of sale are within court's discretion, and no complaint against them will be heard without evidence that the price would have been better had the terms been more liberal. *Idem*.
30. *Upset-bid*.—Where after sale, fairly made for adequate price, has been confirmed, an upset-bid is offered, and the sale is set aside upon condition that said bid be made good by a certain time, when the re-sale should take place upon terms which would not extend the deferred payments beyond the time at which the bonds taken at the previous sale were to become due, and no complaint of said terms was made

PRACTICE IN CHANCERY (*continued*).

below, and no proof offered that upset-bidder could have complied with his bid had the terms been more liberal, there is no ground on this account for complaint in the appellate court. *Idem*.

31. *Interlocutory decrees—Costs*.—No complaint can be made even by the party substantially prevailing, against non-allowance of costs upon an interlocutory decree, as upon final decree the question of costs can be properly adjusted. *Idem*.
32. *Suspension of decree—Judge's delay*.—Where, in such case of upset-bid and conditional setting aside of sale and suspension of decree of sale to a certain period in order to give upset-bidder opportunity to comply with the conditions of re-sale, he applies to the judge in vacation for an extension of such suspension in order to give time to apply for appeal and *supersedeas*, and the judge delays acting on such application till after the period within which compliance was permissible, such action of the judge could not be corrected by the appellate court. *Idem*.
33. *Lunatic defendant*.—Pending a suit against a lunatic represented by his committee, the lunatic dies, the committee *ipso facto* becomes *functus officio* and the suit abates, and must be revived and proceed in the name of the lunatic's personal representative and heirs; and all proceedings had after lunatic's death and before such revival, are void. *Paxton v. Stuart*, 873.

PRINCIPAL AND SURETY.

1. *Co-sureties—Contribution*.—Where principal is insolvent, surety, against whom judgment has been rendered, may have judgment against his co-surety for his share of the debt. But unless such judgment has been rendered, such surety cannot have judgment against his co-surety. Code 1873, chapter 144, section 8. *Strother v. Mitchell*, 149.
2. *Change of contract*.—Surety is discharged by any change of contract, however immaterial, if made without surety's consent. *Christian & Gunn v. Keen*, 369.
3. *Married women—Husband—Surety*.—Where the wife charges her property to secure a debt of her husband, she becomes the surety of her husband, and is entitled to all the rights of a surety. *Idem*.
4. A credit on the account of the principal debtor should discharge *pro tanto* the lien on the surety's estate. *Idem*.
5. *Administrators—Sureties—Devastavit—Statute of limitations—Case at bar*. *Ashby v. Bell's adm'r*, 811.
6. *Release—Counsel fees—Case at bar*.—B. & Co. held judgments against M., binding on land of his surety, W., aliened to G. In suit of *Bank v. M.*, funds were recovered to pay M.'s debts. A decree was entered requiring those participating in said funds to pay 25 per cent. of their

PRINCIPAL AND SURETY (*continued*).

claims for fees allowed plaintiff's counsel. B. & Co. participated, received the amounts of their judgment, less said 25 per cent., and receipted in full. Later, B. & Co. claimed that their judgments were subsisting liens on W.'s land aliened to G., who was no party to the suit, to the extent of said 25 per cent.; and court below directed receiver to collect said 25 per cent. of G. On appeal:

HELD:

1. Release of the principal M. was the release of his surety W.; and the judgment liens were discharged *in toto*.
2. Creditors have no legal right to be re-imbursed by their debtors for counsel fees contracted by them.
3. G. being no party to the suit, the decree was a nullity *quoad* him. *Gurnee v. Bausemer & Co.*, 867.

PUBLIC FREE SCHOOLS.

Constitution—Public free school system.—Hall's Free School, incorporated by act of assembly passed February 6th, 1846, is no part of the uniform system of public free schools contemplated by the constitution; and, therefore, the act of assembly approved December 1st, 1884, (Acts Extra Session, 1884, page 173) providing that the superintendent of public schools in the county of Hanover should pay over in each and every year, commencing with 1884, out of the school quota for Beaver Dam district, in the said county, to the trustees of Hall's Free School, a sum equal to the salary paid to any teacher of a school in said district having a like attendance of scholars, to be by them applied to the support of said Hall's Free School, is unconstitutional and void. *Hall's Free School Trustees v. Horne*, 470.

PUBLIC ROADS.

Easements—Way. *Linkenhoker v. Graybill*, 835.

PURCHASER.

1. *Judicial sales—Purchase money paid into court and lost.*—Where purchaser at judicial sale buys in all the liens save one, and is allowed credit therefor, and then to prevent re-sale, pays into bank, with approval of the court, the amount of the said lien, which the court recognizes as appropriated to the owners of the said lien, and which is later lost by the bank's failure, the loss will fall wholly on the owners of the said lien. Had there remained more than one unsatisfied lien, the loss would then have fallen on the general fund, and been borne by the lienors in the inverse order of the priority of their liens. *Gill v. Barbour*, 11.
2. *Fraudulent conveyances—Innocent purchaser.*—It is not enough that the purpose of the grantor be fraudulent. Knowledge of such pur-

PURCHASER (*continued*).

pose must be clearly brought home to the alienee. Where the latter has denied such knowledge on oath, it cannot be held that his denial is overthrown by mere circumstances of suspicion adduced against him. *Batchelder v. White*, 103.

3. *Purchaser with notice*.—The trust-deed describing the bonds as bearing interest from August 20th, 1873, being duly recorded, C., being about to buy the land of the debtor's vendee, sees the bonds and the contract, and is told that the debtor claimed that the bonds bore interest from the date of the contract, nevertheless purchased the land.

HELD:

C. is not a purchaser for value without notice, and the land in his hands is liable for interest on the bonds from that date. *Ware v. Starkey*, 191.

4. *Judicial sales*.—Re-sale having been directed of certain Springs property for default of payment of the purchase money wherefor M. as surety for F. was bound, M. contracted with parties having interests in said property to buy it, and form a joint-stock company to manage it. To this company as the purchaser the sale was made, reported and confirmed, and the property conveyed; and the contract being before the court with the report of sale, M. was treated as the agent of the company.

HELD:

M. was not personally liable as purchaser. *Frazier v. Hendren*, 265.

5. *Case at bar*.—Part owners and lienors of the Springs property agreed, as a joint-stock company, to buy it, and to pay off the claims on it in the stock and bonds of the company. They so bought it, and the agreement was returned to the court with the report of the sale,—certain other creditors, not parties to the agreement, assenting to it.

HELD:

The purchaser's liability was to pay *money*, and it cannot be discharged in any other thing, *quoad* any party in interest, against his wishes. *Idem*.

6. *Fraud—Purchaser for value without notice*.—On doubtful evidence fraud must not be assumed. It must be distinctly alleged in the bill, and clearly proved. And so, of the defence of purchaser for value without notice. *Gregory v. Peoples*, 355.
7. *Trusts—Possessors of trust property—Liability*.—Trusts are enforced not only against regularly appointed trustees, but also against all persons who come into possession of trust property with notice of the trust. *Hobson v. Whillow*, 784.
8. *Idem—Purchasers with notice—Liability*.—Purchasers or grantees of trust property, with notice of the trust, though they have paid the entire consideration, themselves become trustees, and liable to the *cestuis que trust* for the fulfillment of the trust. *Idem*.

PURCHASER (*continued*).

9. *Complete purchaser—Judgment against vendor—Case at bar.*—B. held adverse, open and notorious possession of land from 1849 to 1862, when D. asserted claim to it, and B. buys up his claim under verbal contract, paying his price in full, and remains in such possession until 1881, when creditors of D., by judgments obtained since 1862, sue to subject the land to their judgments:

HELD:

Apart from B.'s title by such possession, he was a complete purchaser from D. before their judgments were obtained, and their liens never attached to the land. *Bowman v. Hicks*, 806.

QUIA TIMET.

Cloud on title. *Stearns v. Harman*, 48.

REALTY.

Sale for partition—Proceeds—Are they realty? *Turner v. Dawson*, 841.

RECEIVERS.

Appeals—Special commissioners—Defalcation. *Duffy & Bolton v. Figgat*, 664.

RECORD. *See Practice at Common Law*, 16.

RE-HEARING. *See Practice in Chancery*.

REGISTRY.

Verbal sales of lands.—The statute in relation to the registry of contracts and deeds does not apply to verbal contracts for the sale and purchase of lands. *Bowman v. Hicks*, 806.

RELEASE.

Principal and surety. *Gurnee v. Bausemer*, 867.

REMOVAL OF CAUSES.

1. *Constitution.*—Act of March 7th, 1884, Acts 1883-'84, page 424, directing that on motion, on twenty days' notice by any party, any suit or proceeding pending in a corporation court shall be removed, as of right, to the circuit court of said corporation, is not unconstitutional. *Town of Danville v. Blackwell*, 38.
2. *Mistrial—Waiver—Mandamus.*—In such a case there was ineffectual trial. At next term defendant, after notice under said act, moved for the removal of the case to the circuit court, and the corporation court denied the motion.

HELD:

1. Right of removal was not waived.
2. *Mandamus* is the remedy for refusal to remove. *Idem*.

RES JUDICATA.

1. *Estoppel*.—All matters presented and received, or presentable to sustain the particular demand litigated in prior suit, and all matters presented or presentable under the issue to defeat such demand, are concluded by the judgment or decree in the former suit. *Withers' adm'r v. Sims*, 651.
2. *Parol evidence*.—Where judgment or decree is relied on as estoppel, and pleadings and proceedings in former suit leave it doubtful what was the issue, or state of facts whereon the judgment or decree was rendered, parol evidence is admissible in subsequent suit to show what was actually in issue and determined by former suit. *Idem*.
3. *Deeds—Construction—Case at bar*.—The construction of the deeds of conveyance from H. to P. and from P. to S. and P., passed into *res judicata* by the decision of this court in this cause when it was here in 1879. *Massie v. Heiskell*, 789.

RESULTING TRUST.

1. *Estoppel—Resulting trust*.—Where one having only the equitable title, conveys the land with general warranty; then is discharged in bankruptcy; and afterwards, *with another's money*, buys the land, at a resale thereof for the unpaid purchase money, and obtains to himself a conveyance thereof, such title *does not* enure to his grantee, and he is *not estopped* to deny he had the title, because a trust resulted in favor of him whose money bought the land. *Gregory v. Peoples*, 355.
2. *Equity jurisdiction and relief—Liens—Set-offs*. See *Equity Jurisdiction and Relief*, 13. *Paxton v. Stuart*, 873.

RIGHT OF WAY.

1. *Way ex necessitate*.—If one take conveyance of land surrounded by lands of his grantors and others, he can enforce a right of way under plea of necessity against none but his grantors. *Linkenhoker v. Graybill*, 835.
2. *Case at bar*.—L. bought part of the R. lands knowing how they were situated as to public roads, and that they were entitled to a right of way in one direction over G.'s lands to a public highway, and contracted with his grantors for a right of way out to a public highway over other lands than G.'s. He cannot now be permitted to abandon his said rights of way and have a public road established for his own exclusive use, and to the great damage of G., over G.'s land in another direction to a public highway. *Idem*.

SALARIES.

Constitutional officers—Attorney-General—Offset—Attachment—Garnishment—Withholding Salary—Remedy. See *Officers*, 4, 5, 6, 7.

SALES.

1. *Judicial sales—Purchase money paid into court and lost.*—Where purchaser at judicial sale buys in all the liens save one, and is allowed credit therefor, and then to prevent re-sale, pays into bank, with approval of the court, the amount of the said lien, which the court recognizes as appropriated to the owners of the said lien, and which is later lost by the bank's failure, the loss will fall wholly on the owners of the said lien. Had there remained more than one unsatisfied lien, the loss would then have fallen on the general fund, and been borne by the lienors in the inverse order of the priority of their liens. *Gill v. Barbour*, 11.
2. *Judicial—Private.*—After decree in pending suit, to sell land to pay debts, debtor sells the land by written contract, undertaking to make vendee "sufficient title," takes for the purchase-money vendee's bonds payable to commissioners named in the decree, and a trust-deed on the land to secure them. The sale is confirmed by the court, and its receiver ordered to collect the bonds when due, and apply proceeds to the debts. Such sale is not a judicial, but a private sale. *Ware v. Starkey*, 191.
3. *Judicial sales—Purchaser.*—Re-sale having been directed of certain Springs property for default of payment of the purchase money wherefor M. as surety for F. was bound, M. contracted with parties having interests in said property to buy it, and form a joint-stock company to manage it. To this company as the purchaser the sale was made, reported and confirmed, and the property conveyed; and the contract being before the court with the report of sale, M. was treated as the agent of the company.

HELD:

M. was not personally liable as purchaser. *Frazier v. Hendren*, 285.

4. *Idem—Case at bar.*—Part owners and lienors of the Springs property agreed, as a joint-stock company, to buy it, and to pay off the claims on it in the stock and bonds of the company. They so bought it, and the agreement was returned to the court with the report of the sale,—certain other creditors, not parties to the agreement, assenting to it.

HELD:

The purchaser's liability was to pay *money*, and it cannot be discharged in any other thing, *quoad* any party in interest against his wishes. *Idem*.

5. *Judicial sales—Special commissioners—Defalcation.*—Where purchasers at judicial sale are compelled to pay a second time a part of purchase money, by means of the special commissioner's failure to give required bond, and his default in paying over money collected of them, the jurisdiction of this court to hear their appeal, depends

SALES (*continued*).

on the amount of the defalcation, and not on the amount of his official bond. *Duffy & Bolton v. Figgat*, 664.

6. *Judicial sales—Definition—Case at bar.*—Sale made by order of a court of competent jurisdiction, *pendente lite*, is a judicial sale. An executor having authority under the will to sell land, declines to exercise his authority, but applies to the court for instructions and directions, and is ordered to make sale and report it to the court for confirmation; whereupon, he makes and reports the sale to the court as ordered, such sale is a judicial sale. *Terry v. Cole's ex'or*, 695.
7. *Idem—Bidders—Confirmation.*—Bidder acquires no rights until his bid is accepted and the sale confirmed by the court. Whether the sale will be confirmed depends on the circumstances of each case and the sound discretion of the court in view of fairness, prudence and the rights of all concerned. No general rules will apply to all the cases. *Idem*.
8. *Idem.—Rejection of bid—Case at bar.*—Where sale of land is decreed to pay specific legacies, and the residue to four residuary legatees, and the land is bid in by one of those legatees, and the other legatees oppose the acceptance of the bid and the confirmation of the sale, and show by numerous witnesses well acquainted with the land, that though the sale was open and fair, yet the price bid was grossly inadequate, and that the land if divided and sold in parcels would, on the usual terms of payment in such cases, bring two or three times the price bid; there was no error in the court rejecting the bid, and refusing to confirm the sale and directing a re-sale. *Idem*.
9. *Sale of land for purchase money—Terms—Upset bid.* See *Practice in Chancery*, 28, 29.
10. *Judicial sales—Re-sale.* See *Practice in Chancery*, 2. *Mosby v. Withers*, 82.
11. *Judicial sale—Mistake of boundary.* *Garnett v. Loven*, 456.
12. *Judicial sales—Upset bid.* *Yost v. Porter*, 855.

SET-OFFS.

1. *Case at bar.*—In *Frazier v. Frazier*, 77 Va. 775 (to which case at bar is sequel), a certain sum was held due J. A. F., and to be a lien on the property of the R. A. Springs company, and that property was directed to be sold in default of payment. When the case went back the company brought in, as set-offs to that sum, certain judgments against J. A. F. Upon appeal by him:

HELD:

1. These judgments were lawful set-offs against the decree.
2. The decree in *Frazier v. Frazier* is without error and will not be disturbed, except so far as the costs were given against the ap-

SET-OFFS (*continued*).

pellees generally, when they should be against only W. F., who alone of the appellees had contested the rights of the appellant. *Frazier v. Hendren*, 265.

2. *Salaries of officers.*—*Attorney-General v. Auditor*, 485.
3. *Resulting trusts—Liens.* *Paxton v. Stuart*, 873.

SPECIFIC PERFORMANCE. *See Contracts*, 4, 17, 18, 19, 20.

STATE.

1. *Suits against.*—The State can only be sued by its consent. When a remedy by suit against the State, or any of its officials, is provided, those seeking to avail of its benefits must follow its provisions with exact strictness. *Dunnington v. Ford*, 177.
2. *Idem—Discrepancy fatal.*—Under act of 26th January, 1882, amended 13th March, 1884, Acts 1883-'84, page 527, the suit is required to be commenced by a petition filed at rules, upon which a summons shall be issued to the collecting officer, and regularly matured like any other action at law, and the coupons tendered shall be filed with the petition. A suit brought in any other way is unlawfully instituted, and must be dismissed. *Idem*.
3. *Judgment against State.* *Brown, Davis & Co. v. Greenhow*, 118.
4. *Suits against.*—Under statute commonwealth may be sued in the manner prescribed for any claim due. *Parson's case*, 163.

STATUTE OF LIMITATIONS.

1. *Practice in chancery.*—Courts of equity follow the law as respects the statute of limitations. If a legal claim, barred at law, be asserted in equity, it is equally barred there. *Hutcheson v. Grubbs*, 251.
2. *Idem—Corporeal hereditaments.*—As to the possession requisite to acquire title to things corporeal, the statutory period prevails. *Cornett v. Rhudy*, 710.
3. *Mistake, &c.—Discovery.*—Cases of fraud, trust and mistake, are not within the statute of limitations. At all events, in equity, in cases of mistake, as in cases of fraud, the statute does not begin to run until the discovery of the mistake. *Massie v. Heiskell*, 789.
4. *Mistake—Presumption of payment.*—Claim for purchase money for excess of land conveyed under mutual mistake of fact, is unaffected by any lapse of time short of the period sufficient to raise the presumption of payment. And the existence of deeds conveying title and reserving no lien, cannot reduce the period of limitation to five years, because the averment and proof of the mistake, required the abrogation of the deed, at least *quoad* the purchase money for the excess over what was sold and paid for. *Idem*.

STATUTE OF LIMITATIONS (*continued*).

5. *Administrators—Sureties—Devastavit—Statute of limitations—Case at bar.*—In 1865, E. sued out distress warrant against estate of J, deceased, which had been committed to sheriff, administrator, who wasted it. Warrant was placed in hands of sheriff's deputy to levy. It was never levied, but was returned to, and remained effete in clerk's office until 1880, when E.'s administrator brought chancery suit against sheriff-administrator and his two sureties, alleging the *devastavit*, and asking relief. Against principal and all his sureties, except A., the bill was taken for confessed. A. answered and plead statute of limitations.

HELD:

1. The claim of E's administrator for the *devastavit* was barred as against sheriff-administrator's sureties, *though not against himself*, when the suit was brought in 1880.
2. The suit being on the joint obligation of all the sureties, the defence by A., *not being purely personal to him*, enured to the benefit of all, and no decree can be entered against any. *Ashby v. Bell's adm'r*, 811.

STOCKHOLDERS. *See Joint stock Companies.*

SURETIES. *See Principal and Surety.*

TAXATION.

Municipal corporations—Powers of Taxation. See Corporations, 1, 2.

TAXES.

1. *Coupons—Tax-payers' remedy—Assumpsit.*—Assumpsit against collecting officer is the proper remedy of a tax-payer to recover money paid by him for taxes, after collector's refusal to accept coupons tendered in payment thereof, under act approved January 28th, 1882. Acts 1881-'82, page 37. *Brown, Davis & Co. v. Greenhow*, 118.
2. *Pleading—Special counts—Common counts.*—In the declaration to special counts alleging the tender of tax-receivable coupons to pay the tax, and the defendant's refusal to accept the coupons, and the latter's proceeding to collect the tax in money, when payment thereof was made under protest, the common counts for money had and received, &c., may be added. *Idem*.
3. *Judgment against State.*—The action under this statute is in form against the collector; but being to recover a demand growing out of his acts done *colore officii*, is substantially against the commonwealth, and the judgment is likewise. *Idem*.
4. *Municipal corporations—Powers of taxation. See Corporations, 1, 2.*

TORTS.

1. *Willful torts*.—The proper remedy for a mere willful tort is by action at law. *Salamone v. Keiley*, 86.
2. *Evidence—Damages*.—In mitigation of damages, in an action for false imprisonment, it is allowable on cross-examination to prove that the plaintiff had boasted that he had gained a great reputation from his arrest and imprisonment. *Johnston v. Moorman*, 131.
3. *Judicial officers—Liability*.—When acting within their jurisdiction, judicial officers are exempt in civil actions from liability for their official acts, although such acts are alleged to have been done maliciously and corruptly. *Idem*.
4. *Idem—Idem—Jury*.—In civil actions against such officers, acting within their jurisdiction, it is not for the jury to decide upon the question of the reasonableness of the grounds of the arrest. *Idem*.
5. *Idem—Idem—Case at bar*.—J., mayor of D., whilst acting in his judicial capacity, caused the arrest of M., who sued J. for damages for false imprisonment.

HELD:

J. was not liable to M. in damages for such arrest and imprisonment.
Idem.

TRUST-DEEDS.

1. *Practice in chancery—Enforcing trust-deeds—Correcting mistake*.—Debtor having sold the land as above stated, the master having reported as aforesaid, and the receiver having collected the bonds with no interest until after their maturity, it was competent for that debtor to bring his bill to enforce the trust-deed, or to reform any mistake in any part of the said writings, in order to collect the unpaid interest. *Ware v. Starkey*, 191.
See Deeds, 3.

TRUST PROPERTY. *See Fiduciaries*.

TRUSTS AND TRUSTEES. *See Fiduciaries*.

USURY.

1. *Judgment*.—Where an instrument on its face reserves more than the legal rate of interest, it is usurious in its inception, and judgment shall be rendered for the principal sum only, although the defendant may have filed no plea of usury. *Turner v. Turner*, 379.
2. *Borrower—Relief*.—Where a borrower who has paid no part of the principal, or usurious interest, comes into chancery under Code 1873, ch. 137, sec. 12, he must be required to pay only the principal sum loaned or forborne. *Idem*.
3. *Payments—Application*.—Where payments have been made on the usurious contract, which are merely credited on the bond, and not

USURY (*continued*).

applied specially, borrower is entitled to have such payments deducted from the principal sum loaned or forborne. *Idem*.

4. *Application of payments—Rule—Exception.*—To the rule that the creditor may apply payments when the debtor does not, there is the well recognized exception that he cannot apply them to what is no legal or equitable demand against the payer. *Idem*.
5. *Quære.*—Whether or not the creditor can apply payments to usurious interest where debtor has made no application. *Idem*.

VENDOR'S LIEN.

How extinguished.—Such lien may be extinguished by payment of the purchase money, or it may be waived or surrendered by the voluntary act of the vendor. Case at bar is an instance of such extinguishment of lien. *Frazier v. Hendren*, 265.

VENIRE FACIAS.

See Criminal Jurisdiction and Proceedings, 11, 12.

VENUE.

Criminal proceedings.—Indictment not sustained without proof that offence was committed in county wherein venue is laid; but a strong presumption thereof raised by the evidence suffices. *Richardson's case*, 124.

WARRANTY OF TITLE.

1. *Estoppel.*—Where one conveys land with general warranty, whereof at the time he has not the title, but afterwards acquires it, such acquisition enures to the grantee. The warrantor is estopped from denying he had the title. *Gregory v. Peoples*, 355.
2. *Bankruptcy—Estoppel.*—A discharge in bankruptcy releases the warrantor from liability for covenants broken, but does not affect the estoppel, because the covenant runs with the land. *Idem*.
3. *Idem—Resulting trust.*—Where one having only the equitable title, conveys the land with general warranty; then is discharged in bankruptcy; and afterwards, *with another's money*, buys the land, at a resale thereof for the unpaid purchase money, and obtains to himself a conveyance thereof, such title *does not* enure to his grantee, and he is *not estopped* to deny he had the title, because a trust resulted in favor of him whose money bought the land. *Idem*.
4. *Purchasers for value without notice—Set-offs—Encumbrances—Warranty.*—Vendee, to whom, under mutual mistake of fact, vendor has conveyed more than was bargained or paid for, cannot be regarded, as to such excess, as a purchaser for value without notice. But against vendor's claim for compensation for such excess, vendee may set off any counter-claim he may have for money expended by him in clear-

WARRANTY OF TITLE (*continued*).

ing the property of encumbrances existing thereon when the conveyance was made. Vendee's right to set off such counter claims, is not founded on the idea of a breach of warranty, and is not affected by the question whether the warranty of the vendor was *general* or *special*, but rests on the principle that "*he that asks equity must do equity.*" *Massie v. Heiskell*, 789.

WILLS.

1. *Codicils—Re-publication.*—Upon a paper, whereon there was writing dated 1858, and purporting to dispose of H.'s property, but without signature or attestation, H., in 1864, wrote another instrument, with the caption "Codicil to the above will," which instrument was duly executed and attested.

HELD:

The execution of the codicil effects the republication of the will, and brings the latter down to the date of the codicil, so that both speak as of the same date. *Hatcher v. Hatcher*, 169.

2. *Rules of construction.*—See opinion for some of these rules. *Idem*.
3. *Construction—Case here.*—Testator had five daughters. To each of the three married ones, in his lifetime, he gave two slaves, and confirmed the gift by will of 1858, by which he gave each of his two unmarried daughters, L. and F., two slaves, provided for equal distribution of his other estate, and added: "If anything should happen to the negroes named for L. and F. before they get fully in possession of them, I wish said loss made up to each of them, as I wish to make all my children equal in the division of my estate." By codicil of 1864 he adds: "I wish, at the close of the war, the property not already devised, with the exception of the land and negroes, to be equally divided among my children. The negroes to be hired out, with the exception of Nelly and Henry, who I wish to remain on the farm, and aid in supporting my daughters L. and F. while unmarried, it being my wish that they shall have the farm and the two negroes above named to support them on it, while unmarried, till the year 1871."

HELD:

1. The loss of the slaves, by emancipation, is within the intention of the testator, and L. and F. are entitled to be compensated for the loss.
2. L. and F. are entitled to a support, and nothing more, while unmarried, from the farm. *Idem*.
4. *Devise—Valid as to class—Void as to individuals.*—"Item. I give to my brother W. all the residue of my estate, to be held by him in trust, and to be distributed among my next of kin *who may be needy*, in such proportions and at such times as in his opinion may be best ;

WILLS (*continued*).

and I do authorize him to so dispose of my estate either in kind or to sell and convert into money." W. was named as executor in the will, but died before qualifying. The administrator *d. b. n. c. t. a.* brought suit to construe the will.

HELD:

1. The devise is valid as to the class, "*the next of kin*," but invalid for uncertainty as to the individuals to be selected "*the most needy*."
2. The residue of the estate must be divided among the next of kin according to the statute of descents and distribution.
3. W. is entitled to share in that residue as one of "*the next of kin*." *Fontaine v. Thompson*, 229.
5. *Attestation*.—Code 1873, chapter 118, section 4, requires the attestation of two subscribing witnesses, but no particular form, or place on the paper, yet the witnesses, unless the will be olograph, must subscribe *as witnesses*, though the word "witness" need not appear. *Peake v. Jenkins*, 293.
6. *Case at bar*.—Instrument propounded as the will of J. is wholly written by H. and signed "J. by H." and is attested "Witness: L." L. being dead, the instrument is probated on the testimony of H. as a subscribing witness.

HELD:

1. The instrument was not attested pursuant to the statute.
2. H. did not subscribe "as a witness," and could not attest the will. *Idem*.
7. *Testamentary—Case at bar*.—Instrument dated 13th April, 1870, speaks of "the testatrix" in the third person, and merely recites that she had spoken to the amanuensis "of her wish to make a will to secure to her son J. \$200 a year for every year he had been staying at home with her since his father's death," and that on 3rd of January, 1870, she had asked the amanuensis "to write her will for her to copy," &c.

HELD:

The instrument is not testamentary in its character. *Idem*.

8. *Construction—Res judicata—Case at bar*.—In 1871, testator willed property to be held by his executors in trust for G. and E., until they respectively arrive at twenty-one, or marry; if either die without lawful issue, then the whole to be held for the survivor until twenty-one; and if survivor be twenty-one at time of such death, then the whole to go to him; but should both die without lawful issue, then the whole to revert to testator's estate. Executors declining, B. qualified as administrator *c. t. a.* In 1872, G. and E., still minors, brought their bill against administrator *c. t. a.* and testator's children, reciting the will, and praying the court to decide if the trusts in the will devolved

WILLS (*continued*).

on the administrator *c. t. a.*, and if not, to appoint a trustee to execute those trusts, and to direct him to pay G. and E. a reasonable sum for their maintenance. The court decided that G. and E. each had a vested estate, subject to be divested, and if either died under twenty-one, the whole to go to survivor; that the estate being vested, G. and E. each was entitled to maintenance out of it; and that each was entitled to the possession of his portion when he attained twenty-one, or married. G. and E. both attained twenty-one and died without lawful issue. In 1881, testator's children brought their bill against G. and E.'s representatives for construction of the will and recovery of the property. Defendants answered, citing the decree of 1872, as having properly adjudicated the issues raised by the bill last mentioned.

HELD:

1. The matters put in issue by the bill of 1881, were not embraced in the issue presented by the bill of 1872, and are not *res judicata*.
2. G. and E. each took a vested equitable estate in fee, subject to be divested only on the death of each under twenty-one, without lawful issue, and so soon as each of them arrived at twenty one, his estate became absolute and indefeasible. *Withers' adm'r v. Sims*, 651.

WITNESSES.

1. *Committee of lunatic—Competency*.—The committee of a lunatic is competent to testify as to a contract made by him with a former committee of the same lunatic concerning the latter's affairs. *Carter v. Edmonds*, 58.
2. *Idem—Re-examination of witnesses*.—It is a general rule that a deposition once taken, cannot be re taken without the leave of the court, which will always be granted whenever justice seems to require it. *Idem*.
3. *Professional experts*.—See opinion as to the value of their testimony. *Ware v. Starkey*, 191.
4. *Disqualification*.—Conviction of petit larceny does not in this State disqualify one as a witness. *Barbour's case*, 287.
5. *Impeachment*.—A witness cannot be impeached by proof of particular acts and offences committed by him. *Idem*.



